United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7161

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-7161

FLM COLLISION PARTS, INC.,

Plaintiff-Appellee-Cross-Appellant,

—against—

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,

Defendants-Appellants-Cross-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
(D.C. 73 Civ. 713 (T.P.G.))

JOINT APPENDIX

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

VOLUME VI

§ 7 Opinion of the Court and Post-Opinion Developments (continued)

§ 8 Post-Judgment Developments

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February 9 and March 1, 1976 (Cont'd)**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

FLM COLLISION PARTS, INC., :

Plaintiff, :

-against- : 73 CIV 713

FORD MOTOR COMPANY and FORD MARKETING CORPORATION, :

Defendants. :

----------x

Before

HON. THOMAS P. GRIESA,

District Judge

New York, N.Y.
March 2, 1976 - 2 p.m.

APPEARANCES:

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of Counsel

MR. JULIEN: If your Honor please, I have some housekeeping short matters to bring to your attention, perhaps to update you as to what happened since last we met.

You may recall I made a suggestion at that time that to expedite matters counsel could examine by way of deposition the attorneys making the application, and with respect to Mr. Wasser, Mr. Jaroslawicz and Mr. Schlesinger that has taken place.

They have been examined under oath--not David. Mr. Schlesinger and Mr. Wasser.

Then, in addition to that, we were in receipt last night at six o'clock of a lengthy set of papers submitted by our opponent and a brief as well on the attorneys' fees. So I would think with these matters before you, with the depositions, should you care to look at them in any respect, and just a brief forty-eight hour period for us to reply to the papers received last night, that attorneys' fee matter would seem to me to be sufficiently explored and then all we need do today, unless counsel has some other idea, is continue with Mr. Wasser, who has yet to be cross examined. I have a few items on an offer of proof and that looks like it.

THE COURT: I think so.

The only question is, whether you--have you read

the materials submitted by Mr. MacCrate?

MR. JULIEN: No, not yet. I started to read them.

THE COURT: I think I have all the information I need to act on this fee application except one thing. I don't think anybody has put into evidence anything about what the--well, let me put it this way: I don't think anybody has put into evidence anything that would really be an evidentiary basis for determining the hourly rate. Now, you have listed some hourly rates, Mr. Julien, for yourself $200 an hour, for Mr. Schlesinger $125 an hour, for Mr. Jaroslawicz $65 an hour. Mr. Wasser is listed at $100 an hour. I recognize that this is the kind of hourly rate for what we will call the first stage of the evaluation, but nobody has indicated, and I am certainly out of touch anymore with what experienced partners in law firms are charging when they do charge on an hourly basis. I don't really have a basis for evaluating your $200 an hour, Mr. Schlesinger's $125 an hour and Mr. Jaroslawicz' $65.

I don't think really you have given me anything either, Mr. MacCrate. What do I do about that?

MR. MAC CRATE: Your Honor, in the Lindy Brothers case at 382 Fed. Supp. 999, there is a rather extensive table that was revealed.

THE COURT: When was that case?

MR. MAC CRATE: That was decided in 1974, so I believe it is fairly current.

THE COURT: You don't seek to put in evidence? I would think you would know what is the hourly rate of an experienced partner in a New York law firm when they bill clients. What do they generally bill?

MR. MAC CRATE: There are all different rates, your Honor.

THE COURT: Then what does the Lindy case mean to me?

MR. MAC CRATE: The Lindy case breaks down and shows lawyers' date of admission to the bar and the rate, how long they have been practicing. It places the whole thing into a context. I think it does provide some standard of comparison.

THE COURT: Were they New York lawyers?

MR. MAC CRATE: Philadelphia, but the firm of Harry Cohen and David Berger and their various colleagues were being assessed there.

THE COURT: Can you give me any idea--in other words, if an experienced partner in a New York firm works on litigation, say, from the defense standpoint, and works up two or three hundred hours, what does he charge?

MR. JULIEN: Wouldn't it be more what I charge? I can tell you that.

THE COURT: What do you charge?

MR. JULIEN: On a defense case I charge $1,500 a day for my time.

THE COURT: How many hours do you work in a day?

MR. JULIEN: The average court day I would say--that's a court day, your Honor--not more than five, generally speaking.

THE COURT: I don't know too many people charging $300 an hour.

MR. JULIEN: Your Honor, I am a trial lawyer of some forty years experience and even that rate I no longer find attractive, I tell you this, but the last fee arrangement I made for a defendant's case, and that is last year, a case to be tried this year, that was the fee.

THE COURT: Do you have that case here, by any chance, Mr. Mac Crate, the Lindy case?

We can get it. What is the cite on that?

MR. MAC CRATE: 382 Federal Supplement.

MR. JULIEN: My associate reminds me in two other matters in which I was either lead counsel or associate counsel for a multi-plaintiff case, I have charged in one $200 an hour, and that has been paid, that has been allowed. That is the Memorex case.

THE COURT: You charged to a private client of yours?

MR. JULIEN: No, that was my fee application.

THE COURT: In what kind of a case?

MR. JULIEN: Securities case, your Honor.

THE COURT: Was that the fee after all the premium or whatever? In other words, the way I regard the rule under City of Detroit is, you start assessing what would be a so-called normal hourly charge and then if there has been successful result and risk taken and so forth, you add a premium. I am asking about what is to be figured before we get to the question of premium. The $225 in the Memorex, was that before premium?

MR. JULIEN: $200 before premium. That was a matter settled during litigation.

One other thing I want to call your attention to. The difficulty in assessing my time with respect to the time of other senior partners is that I am a litigator almost exclusively and almost all my time is either preparing for the trial or engaging in a trial. Consequently, while the rates may look a little high, and perhaps they are, this is the kind of charge I would be making.

THE COURT: How about for Mr. Schlesinger?

MR. JULIEN: Mr. Schlesinger's and Mr. Jaroslawicz's rates are comparatively modest. I throw myself on the Court. Even if your experience is somewhat out of touch in recent years, this is not so high a figure as to be not in keeping

with the rate--

THE COURT: Mr. Jaroslawicz, the $65 an hour is really extremely modest. I don't see a problem.

MR. JULIEN: Mr. Schlesinger is the next senior in my firm.

THE COURT: He practices since '62?

MR. SCHLESINGER: That's right, your Honor.

MR. JULIEN: I don't know that generally there is expert testimony with respect to these things, but I assure you if I thought that would be of assistance to you, and I really don't see whether our joint experience should require that, there would be no difficulty in having experts testify.

THE COURT: Mr. MacCrate doesn't propose to put any in and I will take your representation as to what your--I will take what you say to me now as testimony and you can be cross examined if Mr. MacCrate wishes to do so.

MR. MAC CRATE: We attempted in the deposition to get this information and we were denied the opportunity.

THE COURT: You have the opportunity now. If you want to cross examine him, you can. You are representing this to me and I will take it for the record and not have you go through the formalities of taking an oath.

MR. JULIEN: Very well.

THE COURT: I will get the Lindy case down, but

let's consider that subject to your right of reply, which I will give you certainly--do you wish to cross examine Mr. Julien or put anything further in from your standpoint, Mr. MacCrate, on the fee application?

MR. MAC CRATE: I believe, your Honor, that the hourly rates suggested by Mr. Julien are substantially in excess of what was allowed in the Lindy case for Mr. Harold Cohen and Mr. David Berger.

THE COURT: I will look at that case.

MR. JULIEN: I am not suggesting that be allowed.

MR. MAC CRATE: And that on a comparable basis, in light of the experience of Mr. Schlesinger and Mr. Jaroslawicz, what they are down for in the papers is in excess, again, of the standards that are indicated.

THE COURT: You have no other evidence to put in?

MR. MAC CRATE: I have no further evidence.

THE COURT: The record, therefore, is closed regarding the fee application.

MR. JULIEN: Except for our answer.

THE COURT: What are you going to put in?

MR. JULIEN: When I have read his affidavit in opposition to fees, I will decide whether anything is required in opposition to that, and then we were drafting a brief, but upon receipt of this we are redrafting it so as to reply

to it.

THE COURT: I hope you won't find it necessary to put any more factual material in it because that is the purpose of the hearing.

MR. JULIEN: It is closed for that purpose. This is only argument.

THE COURT: The only thing you would be submitting is a memo?

MR. JULIEN: I really can't say about the affidavit. I haven't read it.

THE COURT: I wanted to have the factual record complete.

MR. JULIEN: No facts, your Honor.

THE COURT: So the only thing I will receive is a memo from you, if you wish, and that will be due by the end of the day Thursday.

MR. JULIEN: Very well, sir.

THE COURT: That completes the record on the fee application.

MR. MAC CRATE: Your Honor, on that point, there is, of course, the aspect of costs related to the fee application and we do have evidence that we are prepared to present relating to the costs of preparing claims for wholesale incentive.

Now, whether that relates to the damage issue that is before your Honor or relates to the fee application is a question and it depends upon how your Honor enters a decision. If the amount of accounting time claimed as a so-called cost or expense were to be allowed, it is our position that that is a duplication of what is built into the wholesale incentive to cover the cost of the claimant of the wholesale incentive, and it would constitute a double recovery were that to be included in the costs allowed on the fee application.

To that extent, I do have an additional presentation to make, but it relates also to the damage issue.

THE COURT: I think, as a matter of law, that the cases in this circuit indicate that they are not entitled to recover the cost of accounting work, retention of accounting experts. So my view is, at least now, subject to whatever additional material Mr. Julien comes up with in his memo, my inclination, now, is not to allow the accounting fees.

As I understand it, there is a request for about $46,000 in accounting fees, and I think that is something that those accountants have to bill FLM for. It doesn't mean they work free, but I don't understand the Second Circuit cases they can get that from Ford. So, unless you see some

reason to make a record in that regard, I tell you now I don't see how I can as a matter of law award that in any event.

So that's that. I am telling you all I know at the moment. I will not award accounting fees as part of the attorneys' fees and costs to be awared under Section 4 of the Clayton Act.

MR. MAC CRATE: In that event, I would not have evidence to present.

THE COURT: Let's go and turn our attention back to the question of damages.

What further evidence does anyone wish to put in on that?

MR. JULIEN: Mr. Wasser was on the stand when last we adjourned, and I had a few items which are to be marked in evidence and just a few which are offered which I understand your Honor is declining to accept just to complete my offer.

THE COURT: You may do that.

D A V I D W A S S E R, called as a witness by the plaintifff, being first duly sworn, testified as follows:

THE COURT: I think you were under oath anyway, but we will repeat it.

THE WITNESS: Yes.

MR. JULIEN: If your Honor please, we had considerable

testimony as to Exhibit 1000, which has been marked for identification, and 1003, likewise marked for identification, and now I respectfully offer those two documents in evidence.

MR. DALLAS: Your Honor, before there is an offer putting those into evidence, we would move that there should be either a voir dire of Mr. Wasser that be deferred until there has been cross examination because we believe there are substantial and serious grounds for having these exhibits excluded entirely.

THE COURT: You are welcome to have a voir dire.

MR. DALLAS: Does your Honor prefer to have that at this time?

THE COURT: That's right, sure.

MR. DALLAS: Fine, your Honor.

VOIR DIRE EXAMINATION

BY MR. DALLAS:

Q Mr. Wasser, do you have copies of Plaintiff's Exhibits 1000 for identification and 1003 and 1004 for identification?

A Yes.

Q Turning your attention first, if I may, to Plaintiff's Exhibit 1000 for identification, in the column that says wholesale incentive credit, the grand total, do you see that?

A Yes.

Q Which I believe is $248,830 and some odd cents.

A Right.

Q Mr. Wasser, that total reflects the entire amount of the wholesale incentive, does it not, for the period of November, 1972, through February, 1976, or up to February, 1976?

MR. JULIEN: February 6th.

Q February 6th?

A Yes.

THE COURT: That is what it says.

Q In other words, you are assuming, are you not, Mr. Wasser, in that calculation that entire amount of the wholesale incentive allowance would have been passed on by the franchised dealer to FLM in their purchases of eligible crash parts?

A MR. JULIEN: That is not really voir dire, if your Honor please.

THE COURT: Are you objecting?

MR. JULIEN: Yes, I do object.

THE COURT: Sustained.

Q Mr. Wasser, let me turn your attention to Exhibit 1003. There you are using the sales period for 1973, are you not, as your level basis--

A Yes.

Q (Continuing) -- of $798,947? Isn't it true for that entire period, excluding one month, that was the period in which FLM was not receiving incentive allowances on purchases of crash parts from franchised dealers?

A That's true.

THE COURT: Let me hear the last question and answer, please.

(Record read.)

Q Mr. Wasser, calling your attention again to Plaintiff's Exhibit 1003 for identification, for the last four and a half months reflected in that exhibit it shows that there is an increase in sales over the level basis for that period?

MR. JULIEN: This is not voir dire, your Honor. I object to it.

THE COURT: I don't know what this has to do. It goes to the merits.

MR. DALLAS: If I may have the Court's indulgence, perhaps I am using the voir dire in an improper way. If I am, I would appreciate the Court's instruction. The purpose of this is to show that this chart is an entirely speculative document. There is no evidence in this record to show that this period had FLM been receiving incentive allowance as reflected in the fact that he is using a period as his level basis in

which all but one month was in a period in which FLM did not receive the incentive allowance and yet showed a substantial increase in sales over the period 1972, and for other reasons which we will get into on cross examination and with other witnesses we submit that this is a document which has other defects that wholly preclude the use of this as a basis for an evidentiary claim for damages.

If that is not voir dire, your Honor, I apologize, but it seems to me--

THE COURT: If something is wholly speculative, well, I guess it doesn't belong in evidence, but you can argue that. I don't know what you are going to profit by asking him questions. He has laid out what he has done here. It is evident. You say it is wholly speculative. You say it is wholly speculative and, if that is an objection, that is overruled. We don't have to have a lot of voir dire about it. I overrule that.

Do you have anything else you need to ask him about going to the foundation or lack of foundation of this document?

MR. DALLAS: Just a few more questions, your Honor. I think the other matters could be more profitably taken up in cross examination in view of the Court's ruling.

THE COURT: Fine.

MR. DALLAS: Actually, your Honor, in order to expedite matters, I will save all these matters for cross examination in view of the Court's ruling.

THE COURT: Fine.

Then I will receive--what are you offering?

MR. JULIEN: 1000, if your Honor please. That is Exhibit C attached to the group of papers.

THE COURT: Let me understand. I want to know what objections there are to Exhibit 1000. I am not clear and I don't want to miss anything.

MR. DALLAS: Okay, your Honor. The fundamental objection we have to Exhibit 1000 is that it assumes that for the entire period from November, 1972, through February 6, 1976, FLM would have received the entire amount of the wholesale incentive allowance passed on to it by franchised dealers.

We submit, your Honor, there is absolutely nothing in the record to support that point.

THE COURT: I disagree and overrule that objection. Is there any other objection?

MR. DALLAS: The other objection--

THE COURT: In the first place, I don't know that that is an objection to the document, but I won't quibble with you.

At any rate, are there any other points you wish

to make about this exhibit?

MR. DALLAS: This is a secondary objection we have, as to the method of calculation of the estimated wholesale incentive allowance for the period December 23, 1975, through February 6, 1976. We believe that that's a period that is a wholly unrepresentative period, being immediately after the holiday season in which presumably FLM was closed. Certainly the dealerships were closed.

THE COURT: That goes to weight. You take that up on cross. Any other objections?

MR. DALLAS: To 1000, your Honor?

THE COURT: Yes.

MR. DALLAS: Not at this time.

THE COURT: What do you mean not at this time?

MR. DALLAS: I'm sorry. No.

THE COURT: Those objections are overruled and 1000 is received.

(Plaintiff's Exhibit 1000 for identification was received in evidence.)

MR. JULIEN: The next is 1003.

THE COURT: What are your objections to 1003?

MR. DALLAS: Again, your Honor, as I endeavored to point out a moment ago, the base period that is being used here, and this goes to the whole method of presenting the

evidence in 1003, the level basis used in Exhibit 1003 is the fiscal year 1973. All but one month of that period was entirely within the point in time when FLM was not receiving the incentive allowance at all from franchised dealers on purchases of eligible parts. So we submit that--

THE COURT: If you are objecting to an exhibit, you are either objecting that it has no relevance or that the figures have no foundation, but to argue that--this is an argument that goes to the merits. You are entitled to make it and I will be very interested in hearing it, but I have got to have the exhibit in to even deal with your argument and his argument.

MR. DALLAS: I appreciate that.

THE COURT: That objection I will overrule. Is there any other objection?

MR. DALLAS: I believe that goes to the relevance of this document.

THE COURT: I disagree. Overruled.

MR. DALLAS: The second point is this document uses what we submit to be an irrelevant period for computing expenses.

THE COURT: Overruled.

MR. DALLAS: We submit, further, we have an irrelevant basis for computing the percentage of profit, using 1972

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as the basis with sales in 1973 and expenses for 1974.

THE COURT: Overruled. That all goes to the weight. Are those your only objections?

MR. DALLAS: To Exhibit 1003, your Honor, that's right.

THE COURT: Exhibit 1003 is received.

(Plaintiff's Exhibit 1003 for identification was received in evidence.)

THE COURT: Is there anything else from Mr. Wasser?

MR. JULIEN: Yes. Just on the offers of proof. I will address myself to what you have presently marked as Exhibit D, which I will get an exhibit number on.

MR. DALLAS: I didn't hear you.

THE COURT: Let's have that marked 1005.

(Plaintiff's Exhibit 1005 marked for identification.)

THE COURT: Before I forget it, if you are going to offer 1003, should you not offer 1004?

MR. JULIEN: You're quite right.

THE COURT: I think that is to complete the record. I will receive 1004.

MR. DALLAS: Just so the record is clear, our objection to 1003 applies to 1004.

THE COURT: Overruled.

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(Plaintiff's Exhibit 1004 for identification received in evidence.)

THE COURT: 1004 is that three-page document.

MR. DALLAS: I said it was just the last page of that document. I may be in error.

THE COURT: No, it is the whole thing.

MR. DALLAS: Very well.

THE COURT: What is this 1005?

MR. JULIEN: 1005 is a offer of proof on items your Honor has turned us down on.

THE COURT: What does that relate to?

MR. JULIEN: With respect to the two percent premium which was paid to dealers.

THE COURT: I get you. If it relates to that, you are offering it and I will sustain the objection.

MR. DALLAS: Thank you.

MR. JULIEN: That is Roman numeral I on that page. Roman II on that page has to do with the obsolescence credit. You recall there has been evidence on that.

THE COURT: We discussed that before.

MR. JULIEN: Your Honor rejects both those items, is that correct?

THE COURT: Right.

MR. JULIEN: 1002, your Honor, has to deal with the

growth factor and the alternative suggestions made by Mr. Wasser in his previous testimony which you rejected, too.

THE COURT: Yes.

MR. JULIEN: I offer 1002.

THE COURT: Ford objects?

MR. DALLAS: Your Honor, Ford does object.

THE COURT: I will sustain the objection

DIRECT EXAMINATION

BY MR. JULIEN:

Q Do you recall we had testimony here before his Honor on the questions of stock order allowance?

A Yes.

Q Just one sentence to refresh us on what that is.

A These are--

THE COURT: I remember that quite clearly.

MR. JULIEN: Very good. This is an item you are disallowing, too.

Q Have you computed the total of what amount your client would be entitled to for the stock order allowance had you received it?

A Yes.

Q What is that total amount?

A $86,323.

Q Covering what period?

A That's from February, '69, through February 6, '76.

Q Finally, when orders are made by stock order, are they delivered by Ford to the dealer?

MR. DALLAS: Your Honor, at this point I am afraid this is all relating to matters as to which there has been no indication by the Court that this is a permissible testimony of damage.

MR. JULIEN: I understand that.

MR. DALLAS: I object to the submission of any of the evidence as not being reflected in the record as being

THE COURT: We all understand. I have said numerous times what I will allow and what I won't allow. I would just urge you, Mr. Julien, to make it as expeditious as you can. If the Court of Appeals sends it back, we can assess additional damages in very short order.

MR. JULIEN: Yes, your Honor.

Q What amount is extended by your client for freight on stock orders?

A It would be $17,265.

Q During what period?

A February, '69, through February 6, '76.

MR. JULIEN: I understand your Honor disallows that.

THE COURT: Yes. You have your record. Anything

else?

MR. JULIEN: I think that's it, your Honor.

THE COURT: Is there any cross examination?

MR. DALLAS: Just a few minutes cross examination, your Honor.

With the Court's permission, I would like my somewhat abortive voir dire to be considered part of the cross examination of Mr. Wasser.

THE COURT: Okay.

MR. DALLAS: Thank you, your Honor.

CROSS EXAMINATION

BY MR. DALLAS:

Q Mr. Wasser, turning again to Plaintiff's Exhibit 1000 and the items of wholesale incentive credit which is referred to as estimated for the period December 23, 1975, to February 6, 1976, do you have that?

A Yes.

Q It comes to an amount of $12,700.

As I understand your earlier testimony, that computation was based upon actual purchases made by FIM for the week of December 23rd to December 31st, as well as December--excuse me--January 5th through January 9, 1976?

A Yes.

Q And the purchases by FIM for December 23rd to December

31st was approximately $2,500?

THE COURT: It's all in the record.

MR. DALLAS: Just if your Honor would indulge me to get a frame of reference.

THE COURT: There is a frame. I have it right in front of me. Let's assume I know it and it's in the record.

MR. DALLAS: Thank you, your Honor.

Q Mr. Wasser, for the following four weeks you used a projection for calculating the claimed incentive period of $19,500 of purchases made January 5th through January 9th, is that correct?

A Yes.

Q And that was the period immediately after the New Year's season, was it not?

A Yes.

Q And was FLM open on New Year's day?

A No.

Q How about Christmas day, was it open then?

A No.

Q Do you know whether the franchised dealers from whom FLM customarily purchased parts were open on those days?

A No, I do not know.

Q Do you know whether Ford Master Parts, in Teeterboro, was open on those holidays?

A No, I don't.

Q Do you happen to know now, at this time, Mr. Wasser, what the actual purchases by FIM were for the period--the week following January 9th? That would be the week of January 12th through 16th.

A Will you give me a moment?

Q Certainly.

A I don't want to hold up the Court's time. I might or might not have it. I might have to go through my other files.

MR. JULIEN: May he step down for that purpose? He thinks he may have it over there.

THE COURT: You can interrogate--you just provide what you know, and if Mr. McKee needs to take the stand, he will take the stand. You don't have the figures, right?

THE WITNESS: Not on the stand. I might have the papers in my briefcase.

Q Do you know if Mr. McKee would have knowledge of those specifics?

A You would have to ask Mr. McKee.

Q It doesn't make any difference to me who has them, just as long as we get them. If you believe they are in your briefcase, and Mr. McKee would not know them, I would appreciate if you would ascertain those because I think it is

of some significance for the claim for incentive materials.

MR. JULIEN: May he step down, your Honor, to see if he has them?

THE COURT: Yes.

(Pause.)

Q Mr. Wasser, having resumed the stand, have you in the interim consulted some documents to ascertain any materials I requested a moment ago?

A Yes. We have a summary of the costs of sales for January.

Q So that would cover the entire period from January 1st through the 31st, is that correct?

A Yes.

Q And what is the summary of the total costs?

A $67,154.

THE COURT: Do you have it by week or not?

THE WITNESS: It would take a little time.

THE COURT: But the whole month of January would be what?

THE WITNESS: $67,154.

THE COURT: How does that compare with the figure of $99,993.36 contained in Exhibit 1000, which was the estimated figure for December 23, 1975, to February 6, 1976? Obviously you have got two different time periods involved,

but I want to know very quickly if your $67,000 figure invalidates the $99,000 figure.

THE WITNESS: Your Honor, the 67,154 is for January. You would have to add the 2,439 for the last week of December.

THE COURT: Twenty what?

THE WITNESS: 2,439.

THE COURT: And that gives you what total?

THE WITNESS: That would give you the total for December 23rd through January 30th.

THE COURT: That's 69,000?

THE WITNESS: Right.

THE COURT: And then you have another week.

THE WITNESS: You would have to add the additional week of 19,511, which is an estimated period.

THE COURT: What do you mean, 19,000?

THE WITNESS: That is not part of the 67,154.

MR. JULIEN: It is the first week in February.

THE COURT: Do you have any figures for the first week in February?

THE WITNESS: Mr. McKee might or might not have that. I do not.

THE COURT: What are the figures?

MR. DALLAS: Your Honor, maybe it would be convenient for the record if we had this book marked as an exhibit. I may

he asking Mr. McKee some questions.

THE COURT: Anything you want to do.

MR. DALLAS: If the plaintiff has no objection, I would like to mark the relevant portion of that book as Defendant's AAA for identification.

MR. JULIEN: There is no objection. Mr. McKee's only point is that he needs it in his work.

THE COURT: We will mark the book for identification and we will give it back to you.

It is Defendant's Exhibit AAA for identification.

What do you call that, sales book?

MR. MC KEE: Sales record.

MR. DALLAS: I would like to have the whole book marked.

THE COURT: All right.

(Sales Record marked Defendant's Exhibit AAA for identification.)

THE COURT: Have we got the actual figures for the first week in February?

MR. SCHLESINGER: Yes.

THE COURT: What's that?

MR. SCHLESINGER: $14,163.82.

MR. DALLAS: Who prepared that computation?

MR. JULIEN: Look at the book.

MR. DALLAS: I don't have the book.

MR. JULIEN: It came from the book, I assume.

MR. SCHLESINGER: The first five entries for the month of February.

MR. DALLAS: I haven't had a chance to look at the book, your Honor.

THE COURT: Can you tell from the book what the figure was for the first week in February? We have had the attorneys stating it.

Q Can you, Mr. Wasser? It has been marked as Defendant's Exhibit AAA.

A 17,000--I'm sorry.

MR. DALLAS: Mr. Wasser, for your convenience, we have a pocket calculator if you would like to make a computation.

A I have a better one in my briefcase.

Q This one is right here.

A 14,194.

THE COURT: We will take it as $14,000--

THE WITNESS: 14,164.

Q Mr. Wasser, by turning to what has been marked for identification as Defendant's Exhibit AAA for the month January, 1976, can you quickly read into the record what the weekly purchases were or does that not give it?

A It is not given.

Q On what basis are entries made into that book, if you know?

A Yes. It's taken from daily records which are compiled from the invoices, the sales invoices, on which the cost is noted upon the sale.

Q So it is on a daily basis rather than a weekly basis?

A It's on an individual invoice basis and this summary is built up.

THE COURT: Mr. Wasser, I have added the figures for the last week in December, for January and for the for the first week in February that we have talked about in the last few minutes. I get $83,757 in contrast to the $99,993 listed in Exhibit 1000. That is a difference of approximately $16,000.

Now, you figured the wholesale incentive allowance on the basis of what?

THE WITNESS: 12.17 percent.

THE COURT: What is 12.17 percent?

THE WITNESS: That is the average of the actual incentive credits.

THE COURT: In other words, we have to take something out of your figure in Exhibit 1000, is that correct?

MR. DALLAS: Your Honor, I would request with respect to this tesimony the actual figure for that period he used to replace that.

THE COURT: We can do it right now and it will end us saving about $1,900.

MR. DALLAS: With the Court's indulgence, I will hand the calculator to Mr. Wasser.

A Give me my own calculator.

Q I have no objection to your own calculator.

Handing you your own calculator, I would appreciate it if you would make the calculation of the incentive allowance based on the 12.71 percent figure you have employed in Exhibit 1000.

A It is a reduction of $2,064..

Q Could you give us the actual figure what it is in dollars?

A $2,063.60.

Q That's the reduction in the 12,709.16 figure?

A That's right.

THE COURT: What is the net?

Q SO what is the net?

A It would be $10,645.56.

THE COURT: Could I ask this? Could you amend Exhibit 1000? I think let's use the actual figures and let's

replace the 99,000 with the 83,000 and the 12,000 with the 10,000 so that people will not be hunting all over the record for this.

Will you do that?

MR. JULIEN: Yes.

(Witness writes.)

Q So that we have a record that is clear, Mr. Wasser--

THE COURT: What is needed for clarification? Let him just write the new numbers in.

Q The grand total now reads $246,766.71?

A That's right.

THE COURT: For the wholesale incentive denied, right, Mr. Dallas?

MR. DALLAS: For the amount claimed by FLM for that period, that's correct, your Honor.

THE COURT: What is the last column? What's that new total?

MR. LUIEN: At the bottom of the first column?

THE COURT: Over at the right?

Q FLM costs, what should that figure be?

THE COURT: One million something.

A That would be $83,757.

THE COURT: Let's have the total. Instead of the 1,958,000 you have something else, is that right? It is a matter of adding two figures. What is taking the time?

(Witness speaks to Court.)

THE COURT: Let's go. The important figure is the 246,000.

THE WITNESS: Right.

THE COURT: You give me the other figure later. Let's go.

What else, Mr. Dallas?

Q Mr. Wasser, calling your attention to the bottom of Plaintiff's Exhibit 1003, you will now have to make certain adjustments there.

THE COURT: He will make those changes, yes.

Q Turning now, Mr. Wasser, to Plaintiff's Exhibit 1004, do you have a copy of that with you?

A Yes.

Q Turning to page three of that exhibit, the gross profit rate there is 33.5 percent, is that correct?

A That's right.

Q And that's based on sales in fiscal year 1972, is that correct?

A It's based upon the gross profit on sales.

Q Were these sales of all parts sold by FLM during the fiscal year 1972?

A These are--yes.

Q And that 33.5 percent represents an average of the

gross profit and sales?

A That's right.

Q And the same is true for the net profit rate of 26.4 percent; that represents the net profit on all sales by FLM?

A That's right.

Q During the fiscal year 1972. Okay.

Now, going back to Exhibit 1003 just for a moment, Mr. Wasser, likewise there the figure for sales in fiscal year 1973 are $798,947 and it also represents all sales made by FLM during the fiscal year 1973?

A That's right.

Q In '72, that figure of $798,000 represents sales of nonincentive bearing crash parts as well as incentive bearing crash parts during that period, is that correct?

A That's correct.

Q What portion of that $798,000 represents sales of non-Ford parts?

A I would estimate less than five percent.

Q Calling your attention again back to the last page of Exhibit 1004 you see that item C, which is captioned "Ford parts portion"?

A That's correct.

Q 95.34 percent. That is intended to represent that portion of all parts sold that were Ford parts?

A That's correct.

Q And that would be Ford crash parts as well--

THE COURT: Where are you looking now?

MR. DALLAS: Excuse me, your Honor. It is item C in parenthesis, the last page of Plaintiff's Exhibit 1004, which says, "Ford parts portion".

Q That 95.34 percent, Mr. Wasser, is intended to represent the sale of all Ford parts sold by FLM?

A Ford crash parts.

Q Your use of the word "crash" parts, is that the same way as you understand Ford uses that term, crash parts?

A I don't know how Ford does. This is FLM's cost of crash parts, Ford crash parts.

Q Does FLM sell any other Ford parts other than crash parts?

A Not to my knowledge.

THE COURT: Let's not get into semantics. We have had this before.

MR. DALLAS: I apologize. I am trying to understand that point.

Q Has that figure remained relatively constant in the last three years, Mr. Wasser, do you know?

A Yes.

Q How about even back before 1973?

A I believe it would be approximately correct.

Q Throughout the whole period to 1965?

A I wouldn't know.

Q Mr. Wasser, I would like to call your attention to the first page of Plaintiff's Exhibit 1004, item captioned "direct expenses," and you have an item there, officers' salaries and advances.

A Yes.

Q Whose salaries are reflected in that item?

A McKee and John N. Dadario.

Q Are they compensated on a flat salary basis or on an hourly basis or something in between, something else?

A The decision is made by the board of directors on an annual basis.

Q At what time in the fiscal year is that decision made, Mr. Wasser?

A It's variable. It is a small corporation.

Q Is it usually made near the end or the beginning or at any time during that year?

A It's not on a fixed schedule.

Q Is the salary paid or does it bear some relationship to the amount of hours that these gentlemen have worked during that year for which they are being compensated?

A No.

THE COURT: Does it bear a relation to the volume of sales? Suppose the sales were up by $100,000.

THE WITNESS: Your Honor, since it is a closed corporation, this element is basically an element of profit.

Q Are you present at those meetings at which this decision is made by the board of directors?

A Basically, yes.

Q Are you a member of the board of directors?

A No.

Q Turning to the second item, other salaries. That figure is $41,612, Mr. Wasser. Who is that item a reflection of?

A The other workers in the company.

Q Do they perform any other functions other than loading and driving? Are they clerks?

A Receiving the parts, driving.

Q Clerical personnel hired by FLM?

A One bookkeeper.

Q Is that person's salary reflected in the cash and other salaries?

A Yes.

Q Are they compensated on an hourly basis?

A On a weekly basis.

Q Is that basis determined by the number of hours

worked during that week?

A They all work on a forty hour week.

Q Would they be compensated for any overtime they might receive for a week in which they worked in excess of forty hours?

A There has been no overtime.

Q Do you know if there is a policy that would allow them to enjoy overtime rates if they did work in excess of forty hours a week?

A It has not come up. There is no overtime.

Q Spanning back to 1972, do you know whether during that period there was ever any overtime paid any employee?

A I don't believe so.

Q Turning your attention to the third item in that same category of direct expenses, item referred to as payroll taxes, how is that payroll tax computed?

A This is based on the taxes that are paid on quarterly tax returns and so forth. It is based on the salaries up to a certain point. It does not go above certain points.

Q So if they reach a certain maximum level above which the taxes wouldn't be reflected in their amount of take-home pay, is that correct?

A It's not take-home pay. It's a tax paid by the

company. This is not the amount taken out of the salary.

Q Is that anywhere reflected in this document?

MR. JAPOSLAWICZ: What?

Q The amount taken out of the employees' payroll check.

A This reflects the expense of the company, not what is taken out of each employee's pay.

Q Mr. Wasser, going back just a moment to the persons you described as other salaried individuals, the second item under direct expenses, if I could call your attention to the period just during late December and January of 1976, were persons employed by FLM engaged in any way in the computation of the claimed loss in wholesale incentive allowance?

A I believe the bookkeeper helped occasionally.

Q And do you know whether or not that person received any salary or compensation in excess of that person's normal hourly--

A I don't believe so.

Q Do you know whether there were any other persons on the payroll of FLM who participated in that process of computing the wholesale incentive allowance?

A I have not seen any. Perhaps Mr. McKee--I wasn't there all the time.

Q Mr. McKee would be the one who could testify to that?

A Yes.

Q Mr. Wasser, calling your attention to the second page, category itemized as administrative expenses, and there is an item auditing. Do you see that? The amount there is $3,000.

A Yes, sir.

Q What is the nature of the auditing expense reflected in that item?

A It's a monthly audit fee charged by me.

Q And what is the nature of the audit done by you?

A We have a monthly audit, reconcile the bank balance, write up some of the records and arrive at a summary figure for the books of the company.

Q In the process of making this audit, do you take into account the wholesale incentive allowance?

A No.

Q Have you charged an audit fee for the period since December 19, 1975, to FIM?

A We have a monthly audit fee.

Q Have you charged a monthly audit fee during that period?

A Can you repeat the period?

Q The period being December 19, 1975, when the Court's opinion was handed down, and up to the present.

A Well, I billed the company for the monthly accounting

related to the bank reconciliations, answering tax inquiries, and this is not related to the incentive credit calculation.

Q Have you billed FLM for the amount spent by you, time expended by you on the incentive credit?

MR. JULIEN: You mean for this lawsuit?

MR. DALLAS: Any question.

MR. JULIEN: I don't understand the question.

Q Do you understand the question, Mr. Wasser?

A No, I have not.

Q You have not. Okay. Turning your attention next to the item right below auditing, captioned "Legal (case) costs," it reflects an item $1,181, does it not?

A Yes.

Q What is the nature of that expense item?

A The company had costs connected with the case. These are part of the costs.

Q What are the costs?

A Messengers, delivery expenses, photograph expenses, calls, toll calls and so forth.

Q Is that an item that is customarily included in FLM's expenses?

A No.

Q What was the reason for including it as a fixed overhead item?

A It is not

A It is not repeated. If the sales were higher, it would not be repeated. It would not go up. We are talking about percentages, not the existence of the expenses.

Q Was there any amount reflected in that item paid to any of the lawyers in this case?

A I believe there was part of that was paid to me for the costs that I expended, part of the costs that I expended.

Q And this was during 1974?

A Yes, yes.

Q Do you recall what the nature of those expense items were?

A They were messenger expenses, photograph expenses.

THE COURT: This is going to end up such a small item and we are spending such a vast amount of time on it, but I suppose that litigation expenses, that is not of interest to me to be included. That ought to be wiped out.

THE WITNESS: It is wiped out by being in the fixed overhead part, your Honor. I'm really excluding these expenses.

THE COURT: You're not, are you?

THE WITNESS: I am.

THE COURT: You are trying to figure out the flexible expenses which should be taken out of--

THE WITNESS: Increased sales.

THE COURT: The normal increased flexible expenses?

THE WITNESS: Right.

THE COURT: I got it. Then why do we waste time on these fixed overhead items? Unless you contend they would be regular increased expenses, which I am sure you don't.

MR. DALLAS: I was attempting to ascertain the basis for that.

THE COURT: I am not interested in an academic thing.

MR. DALLAS: Whether it was appropriate to include it as a variable expense item. Mr. Wasser has explained that point.

Q Going back for a moment to the auditing expense, Mr. Wasser, the monthly fee that you charge is what amount?

A 275 a month.

Q And approximately how many hours does it take you during that month to make whatever audit you do that you are charging FLM?

MR. JULIEN: We are going far afield. I object to it.

THE COURT: What is the last question.

MR. DALLAS: How long it took him to make the audit.

MR. JULIEN: To make his monthly audit which he does each month.

MR. DALLAS: I think it is possibly relevant to a variable expense item; if there are incentive credits that have an effect on his monthly audit it would naturally take him more time to make the audit. If that's true, it is an item that should properly be included in any increased sales that are being claimed by FLM that were received.

MR. JULIEN: He works for a fixed fee of $275 a month.

THE WITNESS: For many years.

THE COURT: If they made many more sales or got their incentive allowance allowed in '73 and '74, you are telling me it wouldn't have increased your monthly fee?

THE WITNESS: No.

THE COURT: Let's go.

Q Mr. Wasser, one last question. Do you remember whether in the period November of 1972, to the present time, there has been any change in the number of employees hired by FLM?

A I think it runs approximately the same.

MR. DALLAS: I have no further questions.

THE COURT: Anything further?

MR. JULIEN: No.

(Witness excused.)

MR. JULIEN: I ask your Honor to judicially notice an item appearing in this Sunday's New York Times with respect

to the price of auto collision parts reported up 56.5 percent.

MR. DALLAS: We would object entirely to that article; it is completely unrelated to this case.

THE COURT: Please. Please don't ask me to take judicial notice of articles in the newspaper. I just won't do it.

What else?

MR. JULIEN: I am going to submit in evidence or offer in evidence the statement from the Council on Wage and Price Stability on the subject of auto parts prices dated February 18, 1976.

MR. DALLAS: Again, we would object.

THE COURT: You have got a person that runs this business. He is sitting here. If you want to put on evidence, you can put on evidence.

S T E P H E N M c K E E, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JULIEN:

Q Mr. McKee, would you tell us what has happened with respect to auto crash parts in the last two to three years with respect to their cost?

MR. DALLAS: We would object to any testimony outside

of his own experience as being something which he is not competent to testify on.

THE COURT: What is outside of his own experience?

MR. DALLAS: What the prices of crash parts might be in some other part of the country or even among dealerships outside of the area he buys from.

THE COURT: You have to testify as to what you know.

A Based on my experience on our sales since, well, take the period '73 to January, '76, crash parts have increased from the very lowest I could see after doing a survey on this, we had increases of 12 percent all the way up to 72 percent on given models.

THE COURT: When?

THE WITNESS: Since '73 to January of '76, your Honor.

Q Increased 12 to--

A 12 to 73 percent.

Q On an overall basis, with respect to crash parts--

THE COURT: That doesn't mean anything. I don't know whether you are talking about a steady increase or whether there were increases of certain percentages on some parts and other percentages on others. I don't know what that statement

means.

MR. JULIEN: I intend to annotate it by some additional questions, your Honor.

Q On an overall basis, just considering crash parts, from your knowledge of the field in this area as well as your own experience in your business, would you tell us how crash parts compare cost price in 1975 up to and including January, 1976, as compared with 1973, 1974 or 1975?

A You are giving me a very broad scope there. It's okay. On the average across this period you say, costs have increased 34 percent.

THE COURT: Since when?

THE WITNESS: Since '73 through '76 on the average. Certain models--

THE C[illegible] What is the average increase?

THE WITNESS: 34 percent.

Q With respect to certain models, has the increase been lesser or greater?

A Certain models the increase has been much greater.

Q What do you mean by models? Would you identify them?

A If we take, for instance, a '74 Maverick as compared to the car which will ultimately replace this as far as sales are concerned, which is the Granada, we will find an

increase of--

MR. DALLAS: I object to the characterization of the Granada as being within the realm of Mr. McKee's expertise.

THE COURT: What is a Granada?

MR. DALLAS: A Ford model car.

THE COURT: Overruled.

Q Please continue.

A All right. A '74 Maverick would cost, at dealer cost, to do a right side fender repair, approximately $213. To do the same repair on a Granada, $420.

Q At what time?

A In January of '76.

Q Why do you compare these two models, the Maverick and the Granada?

A Because at this moment the Granada in particular is the fastest selling item we have in collision parts.

Q And back in '74 which was the fastest?

A In '74, the Pinto would be the fastest selling car.

Q How did the Maverick compare at that time?

A The Maverick in that point would be second.

THE COURT: Were these all Fords?

THE WITNESS: All Ford models, your Honor.

Q In a word, has your volume of items sold, crash parts, for the Ford line, has that increased from the year

1974 to the year 1975 or for the period up to the end of January of 1976, has your volume of parts increased?

A No, the volume of parts actually has not increased to any great effect. I could not say whether we are selling six items as compared to twenty, but there has been no great increase in volume of parts.

THE COURT: No great increase is really meaningless to me. Do you keep any figures on a per item basis or do you just keep figures on a dollar basis?

THE WITNESS: Only on a dollar basis.

THE COURT: How can you tell us about your volume on an item basis?

THE WITNESS: Actually it is based on the fact that I have not had to put on any more staff, put on any more trucks. We are delivering the same quantity of items. We haven't needed any extra staff to handle the items.

THE COURT: Since when? The inquiry I think we are about is this: the figures showed about $100,000 decline and there was evidence in the record that that was caused by the lack of working capital, bad competitive conditions, and so forth. You read that in the opinion, right?

THE WITNESS: Yes, your Honor.

THE COURT: Did you decrease your staff from '73 to '74?

THE WITNESS: Yes, I decreased my staff from '74 to '75.

THE COURT: When did you decrease your staff first?

THE WITNESS: In August of '75.

THE COURT: The first decrease?

THE WITNESS: Yes, August of '75.

THE COURT: There wasn't any decrease in fiscal '74?

THE WITNESS: No, your Honor.

THE COURT: What was the cause of the decrease in sales from '73 to '74?

THE WITNESS: The fact that I didn't have enough capital to meet competition and my prices were too high to meet competition.

THE COURT: But you say you didn't lay off any staff.

THE WITNESS: I tried to continue with the staff I had.

THE COURT: You say the reason was you couldn't meet the competition?

THE WITNESS: I could not meet the competition.

THE COURT: I thought there was some evidence that there was a shortage of working capital, you couldn't buy the necessary trucks.

THE WITNESS: I had a shortage of working capital in that period. I could not afford to buy trucks.

THE COURT: What trucks would you have bought if you had had the working capital?

THE WITNESS: I would have added one more truck.

THE COURT: You would have added one more truck?

THE WITNESS: And covered a bigger area. As it is, I cannot cover an extra area.

THE COURT: You mean that would have been necessary to sustain the level?

THE WITNESS: Right.

THE COURT: Or would that have been necessary to grow?

THE WITNESS: To sustain it, it would have been necessary.

THE COURT: Would you have had to have another driver?

THE WITNESS: Yes.

THE COURT: I don't understand why you would need to add a truck and driver to keep the sales at the same level.

THE COURT: Because, as you expand your territory, you increase your number of customers. As it is, I cannot increase my customers by expanding the distance covered.

THE COURT: Is the increase in your territory necessary to keep your sales level at the same volume?

THE WITNESS: Yes, it would be, your Honor, owing

to the fact that I have lost customers in my own general area to my competition.

THE COURT: I see. Go ahead.

Wait. Then you say you laid off staff in '75?

THE WITNESS: In '75.

THE COURT: How many did you lay off?

THE WITNESS: Just one.

THE COURT: How many employees do you have.

THE WITNESS: At that point I had six and now I am down to five, not including the corporate officers.

THE COURT: Have you ever added a truck or anything like that? What has the situation been since '74 as far as your competition, your competitive conditions?

THE WITNESS: My competitive conditions in '74 has worsened owing to the fact that we now have dealers willing to sell at cost price or slightly over cost price who are of course taking advantage of the fact that they can receive the wholesale incentive.

THE COURT: What time period are you talking about?

THE WITNESS: I am speaking since '74 through the present day.

THE COURT: Was the standard price a 25 percent discount?

THE WITNESS: Basically the discount has been 25.

THE COURT: When you say cutting, you mean cutting below the 25 percent?

THE WITNESS: Below 25.

THE COURT: Close to their cost, is that right?

THE WITNESS: Close to cost, and in many cases close to 35 and actual cost in some cases.

THE COURT: I was curious in writing my opinion, I don't think I followed this up. Prior to the wholesale incentive allowance coming in, the standard discount was 25 percent, wasn't it?

THE WITNESS: Correct, your Honor.

THE COURT: Okay. And if the Ford dealer did the repair itself, of course it got the benefit of the 40 percent discount or 42, right?

THE WITNESS: Correct.

THE COURT: Then if they sold to the independent body shop, they were selling to the independent body shop at list price less 25 percent, is that correct?

THE WITNESS: That's correct.

THE COURT: So they would have the competitive advantage of the 40 percent discount price themselves, whereas the individual would only get, in effect, a 25 percent discount, right?

THE WITNESS: That is correct.

THE COURT: The FTC comes along and complains to Ford and Ford has this wholesale incentive allowance, right?

THE WITNESS: Yes.

THE COURT: And the idea, I guess, was that these dealers would be selling--they could afford to charge--they could afford to give the independent shops the 40 percent discount, basically, right?

THE WITNESS: Bascially that was the idea.

THE COURT: But it never happened, did it?

THE WITNESS: No.

THE COURT: Because the Ford dealers pocketed the wholesale incentive allowance and they kept on giving the independents only 25 percent, right?

THE WITNESS: Right, it was retained in the dealerships.

THE COURT: Pretty consistently, right?

THE WITNESS: To the best of my knowledge.

THE COURT: While you were getting the benefit of the wholesale incentive allowance, I take it you and the Ford dealers were both selling to the independent at 25 percent off of list, weren't you?

THE WITNESS: Correct.

THE COURT: And you and the Ford dealers, except your 3 percent mark-up that you had to pay at list or value,

you and the Ford dealers were on a par, right?

THE WITNESS: At that point, yes, we were.

THE COURT: When Ford withdrew the wholesale incentive allowance for the parts sold to you, that meant that differential we are familiar with, right?

THE WITNESS: Yes.

THE COURT: You could still make a gross profit because you got the part for a discount of--let's see. You got the part for 60 percent of list plus the 5 percent of the 60 percent, right?

THE WITNESS: That's how it is at the present day.

THE COURT: And you would mark it up to independent shops and give them a discount of 25 percent.

THE WITNESS: 25 percent on list, right.

THE COURT: That 25 percent discount was a discount that had been the standard discount given by the Ford dealers to the independents, right?

THE WITNESS: Yes, sir.

THE COURT: So, if that pricing to the independents was retained, you wouldn't be competing on a par with the Ford dealers, right?

THE WITNESS: If it was retained in the dealerships.

THE COURT: I want, then, to have you tell me what

happened, with that framework where you never got into this much depth at the earlier trial, what happened, then, with respect to your competitive ability vis-a-vis the Ford dealer?

THE WITNESS: With the wholesale incentive credits which were allowed to us,, it enabled us to maintain a larger inventory and thereby give better service. Without that incentive there is no way I can retain the same inventory, nor do I have the same operating capital to replace my equipment, to hire additional personnel or in any way to enlarge my corporation.

THE COURT: Because your profits were cut?

THE WITNESS: My profits were completely cut. My profit basically was the wholesale incentive. That was my basic profit.

THE COURT: That was what you carried down to net?

THE WITNESS: Right. Without the wholesale incentives, I have no--there is no way I can compete with the Ford dealer who can go out and sell his cost and still retain--

THE COURT: That is another subject. You are telling me that when your wholesale incentive allowance was cut and cut that much profit, you had certain disabilities as far as working capital and so forth.

THE WITNESS: Yes.

THE COURT: I want to turn to the question of price

competition with the Ford dealers. What happened on that?

MR. MAC CRATE: Your Honor, forgive me, is not this line of inquiry going outside the whole area of the damage hearing that we are having at this time?

THE COURT: It fills in a couple of gaps, not essential gaps, but some things I was frankly curious about when I was writing the opinion. But beyond my curiosity it seems to me that you have challenged the causal relationship between the depravation of the wholesale incentive allowance and his loss of sales after fiscal 1973, and this is a point that I raise as being a possible damage point. These things are hot on my mind so I thought I would ask some questions so we wouldn't have any things that were nagging problems to me left without some resolution.

MR. MAC CRATE: I would like simply respectfully to except to preserve the record.

THE COURT: Okay.

MR. JULIEN: You have an unanswered question here.

THE COURT: What happened about price competition? I don't want it to be left in a vague state. You tell me exactly what happened.

THE WITNESS: In price competition the dealers in my area started to discount at 30 percent and then 35 percent.

THE COURT: When did they start this?

THE WITNESS: In 1974. Do you want the dealer names?

THE COURT: Yes.

THE WITNESS: Empire Ford.

THE COURT: Where are they?

THE WITNESS: Mount Vernon.

THE COURT: What did they do, starting when?

THE WITNESS: Starting in '74. They started discounting to 35 percent on incentive-bearing items and cost on some incentive-bearing items. Ruckle Ford--

THE COURT: 35 percent on incentive-bearing items and--

THE COURT: Cost on certain incentive-bearing items.

THE COURT: You are telling me it was 35 percent generally and cost on certain selected ones?

THE WITNESS: Yes.

THE COURT: What else happened? Have they maintained-- we are now in early '76. What has happened with Empire Ford since then?

THE WITNESS: They have maintained that up to this period. They are still maintaining the same discount structure.

THE COURT: Are they a competitor of yours?

THE WITNESS: Yes, they are competing with us.

THE COURT: What else?

THE WITNESS: We have Ruckle Ford, Yonkers, New York, who are competing at the same price levels as Empire Ford.

THE COURT: When did they start that?

THE WITNESS: I am not actually sure of the date because Ruckle Ford just became a Ford dealer, I believe, in the year '74. I am hazy as to exactly what month they became a dealer.

THE COURT: What is their price level now?

THE WITNESS: Their price level is the same as Empire Ford.

THE COURT: A discount of 35 percent generally and--

THE WITNESS: Cost on selected items.

THE COURT: Can you give me an estimate as to when they started this?

MR. JULIEN: By year or season.

THE WITNESS: Ruckle, I would say in '75; Empire in 1974.

THE COURT: All right. What other instances?

THE WITNESS: In our own general area we have W. H. Jackson Auto Sales, a Ford dealer from Ossining, who are now selling in competition with myself right in Yonkers.

THE COURT: Is that W. H. Jackson Sales?

THE WITNESS: W. H. Jackson Ford Sales.

THE COURT: What do they do?

THE WITNESS: General discount as far as I can determine is 30 percent on all items.

THE COURT: All items or all incentive-bearing items?

THE WITNESS: Your Honor, I believe all items.

THE COURT: Anything else about W. H. Jackson?

THE WITNESS: No, your Honor.

THE COURT: When did they start this policy?

THE WITNESS: Since 1973.

THE COURT: Any other instances?

THE WITNESS: No, that's all, your Honor.

THE COURT: Can you give me an idea of how much these four--it's really three dealers you have mentioned--how important or unimportant are they as competitors of yours?

THE WITNESS: For me to actually state the number of customers that have gone from my operation to purchase from these dealers, I couldn't actually give an actual count of the number of customers lost. I haven't taken time to actually study how many customers I have lost to these suppliers.

THE COURT: Have you lost some?

THE WITNESS: I have lost some.

BY MR. JULIEN:

Q These are all Westchester housed companies, are

they, the three of them?

A Yes, all Westchester County.

Q And on the periphery of Westchester, on its outskirts, outside the county but adjacent to it, are you familiar with any other companies participating in these practices?

A I am not.

THE COURT: You are not?

THE WITNESS: No.

MR. JULIEN: May I have a number on this, please?

(Letter marked Plaintiff's Exhibit 1006 for identification)

MR. DALLAS: I don't believe we have an an opportunity to examine it.

(Plaintiff's Exhibit 1006 for identification shown to Mr. Dallas.)

Q I show you 1006 for identification. Is this a letter emanating from the Empire Ford Sales?

A Yes.

Q Which you obtained from one of your customers?

A Yes, this is a letter I obtained from Franklin Collision, Inc.

Q Is that one of your customers?

A That is one of my customers.

Q The penciled notation on the top, that wasn't part

of the original, was it?

A This was on it when I received it.

MR. JULIEN: If your Honor please, I will offer the letter. The pencil notation I am not sure who put it on there.

THE COURT: Any objection?

MR. DALLAS: No, your Honor.

(Plaintiff's Exhibit1006 for identification received in evidence.)

MR. JULIEN: That's all, your Honor.

THE COURT: Cross examine.

CROSS EXAMINATION

BY MR. DALLAS:

Q Mr. McKee, just turning to 1006, which has just been offered into evidence, maybe I can look over your shoulder so we can look at this together. If you look at the third paragraph down it reads, and you can follow along: "Realizing that price is most important in business during these difficult times, we offer you the following."

What difficult times do you think Mr. Daily of Empire Motors was referring to, do you know?

MR. JULIEN: I object.

Q Were you encountering difficult times at that time?

MR. JULIEN: I object, if your Honor please.

THE COURT: What is the question?

MR. DALLAS: The first question was, there's a statement here, "Realizing price is most important in business during these difficult times," I was trying to get Mr. McKee's understanding of what might have been meant by that term.

THE COURT: Is there an objection?

MR. JULIEN: Yes.

THE COURT: Sustained.

Q Mr. McKee, were you encountering difficult times in June, 1975?

A Difficult times? I would like a little clarification of your question.

Q Were there factors other than an inability to get the incentive allowance that made your business more difficult in June of 1975 than prior times?

A At that period, yes, I had lost some customers.

Q And what was the reason for your loss of customers?

A Strictly price.

Q Strictly price?

A I have never lost a customer that I am aware of for any reason other than price.

Q And you attribute that to factors other than to get the wholesale incentive allowance?

A No, I attribute it strictly to the wholesale

incentive allowance.

Q Looking next to the 35 percent discount that is being offered in this document that has been put into evidence as Plaintiff's Exhibit 1006, that is a discount that is lower than the amount that one would receive from the wholesale incentive allowance, is that not true?

THE COURT: What was the question?

MR. DALLAS: 35 percent is a lower amount than the wholesale incentive allowance.

THE COURT: What do you mean, a lower amount than the wholesale incentive allowance?

MR. DALLAS: One would have to absorb more than the wholesale incentive allowance price to meet that price.

Q Is that right, Mr. McKee?

A The 35 percent discussed in this particular portion of this letter relates to the discount from his price. It has nothing whatsoever to do with wholesale incentive.

Q Didn't you testify a moment ago your customary discount from list price--if I understood your testimony correctly, that is the amount that is less than--that's a lower discount than the discount that a dealer would receive with the wholesale incentive allowance? Do you understand my question?

A I do not really understand your question.

Q Let me make it clear. In other words, if you have

the wholesale incentive allowance, that's a 25 percent discount off of dealer net, is that right?

A Off dealer cost.

Q Now, is the 35 percent discount offered here a smaller discount than the wholesale incentive discount?

A The 35 percent offered here is offered off of list.

THE COURT: I don't think your question is meaningful.

Q I am trying to understand. Could you, Mr. McKee, have offered a 35 percent discount that's offered here which would be in dollars and cents to you a smaller amount absorbing that to meet that 35 percent discount than you are having to meet just by offering a part without the 25 percent wholesale incentive allowance?

MR. JULIEN: I object.

THE COURT: Sustained.

Q Mr. McKee, how did you arrive at the 34 percent figure that you gave at the beginning of your testimony, that being parts on the average have increased in price by 34 percent?

A I arrived at it by taking the Ford price books applying at the time, which would be any month you want to take, but I took it from '73 through January, '76, and I applied it to individual items which are sold basically on a daily

basis or, as we would say, on a one side hit of a car. In other words, I based my figures on a grill, a right side head lamp, a right side fender, a hood, a right side hood moulding, right side wheel opening moulding, a right fender skirt. Basically, a right side hit of an automobile.

Q That would include both front end and back end parts?

A Front. Right side front hit only.

Q So you have no figures that would reflect what increase in price of parts in the period you talked about earlier for rear end collision, is that correct?

A No, I didn't do any survey on rear end.

Q When did you do this survey, Mr. McKee?

A I completed it this past weekend.

Q When did you start it?

A I started it right after the last Court hearing. I think it was February 9th.

Q You testified a moment ago that you have now five employees, is that correct?

A Five employees, that's correct.

Q And you have had five since when?

A Since August of '75.

Q And before that time you had six employees?

A Six employees.

Q And how long did you have six employees before that time?

A I believe January of 1973.

Q And before January of 1973, how many employees?

A Five.

Q And how long did you have five employees then?

A It is too much for me to remember.

Q And how many trucks do you have at the present time?

A Three.

Q Have you ever had more than three trucks?

A No, I have not.

A And have you had less than three trucks?

A Oh, yes.

Q When was the first time you had three trucks?

A I believe early '72.

Q Early '72. You also testified a little bit earlier on direct--

THE COURT: Let me get this. Early '72 you had how many?

THE WITNESS: Three.

THE COURT: And how many do you have now?

THE WITNESS: I still have three, your Honor.

THE COURT: Did you go up since that time?

THE WITNESS: The question was, when did I start

having three trucks.

THE COURT: I see. You have had three trucks since early '72.

Q To complete the record, Mr. McKee, I don't want to stretch your recollection too far back, but I take it you had two trucks in early '72 and going back some time?

MR. JULIEN: Did he say two?

A At one time I only had one.

Q Do you recall when that was?

A I wouldn't possibly recall which years I added each truck.

Q Very well. You also testified a moment ago that the volume of parts that you sold has not increased, is that correct?

A Correct.

Q It's true, isn't it, that the volume is dependent largely on the number and severity of crashes?

A Yes, I would agree with this.

Q It has nothing to do with the incentive allowance, does it?

A No.

THE COURT: I think we better take a little break.

(Recess.)

THE COURT: Okay. Can you go ahead?

MR. DALLAS: Thank you, your Honor.

Mr. McKee, you understand you are still under oath.

CROSS EXAMINATION (Cont'd.)
BY MR. DALLAS:

Q I think the last question that I asked you concerned factors involving volumes of sales. Based on your experience, Mr. McKee, are there other factors which affect the volume of your sales other than the number and severity of crashes?

A Like the periods of bad weather will affect our sales. Our sales would naturally increase during bad weather periods.

THE COURT: Your sales will what?

THE WITNESS: Increase.

Q Has the 55 mile an hour statutorily enforced speed limit had any effect?

A Not whatsoever.

Q How about the impact of resistant bumpers that have been put on recent cars?

A They have an effect. They have increased the dollar value of sales.

THE COURT: What kind of a bumper is that?

THE WITNESS: In this case he called it an impact

bumper, I believe.

THE COURT: Is that what you called it?

MR. DALLAS: I called it an impact-resistant bumper.

Q These are bumpers designed to resist impacts of up to five miles an hour, is that right?

A Yes.

Q But you say they are a higher priced item?

A They are a higher priced item.

Q So if there is a car that comes in that needs such a bumper, it would be a higher price?

A Much higher.

THE COURT: Don't they help lessen the destructive impact of collisions so that maybeother parts of the car are preserved a little better?

THE WITNESS: In general practice that does not happen. What happens by increasing the strength and weight of the front of the car, they have created a problem on the automobile.

THE COURT: Ralph Nader is going to be sorry to hear about this. I don't know. Maybe he wasn't the proponent of that.

THE WITNESS: May I illustrate, your Honor?

THE COURT: No, it's all right.

Q Mr. McKee, have you found from time to time, since 1972, that you have gotten new customers in your business?

A We have added some new customers, right.

Q And I believe you testified earlier that--did you testify that if you were granted the incentive allowance, would you have to add any additional employees?

A If I was granted the incentive I would increase my business and need more employees.

Q Would it be your practice to add an additional employee or two?

A It would be.

Q And would it be your practice to add a truck or two?

A It would be.

Q Would it be your practice if you were allowed the incentive allowance to build up your inventory?

A Right.

Q And build up your plant?

A I think our plant could contain a small increase of business, but we would enlarge.

MR. DALLAS: I have no further questions.

THE COURT: This would be if you increased your volume of business?

THE WITNESS: Yes.

THE COURT: You would do whatever would be necessary to increase your volume, is that right?

THE WITNESS: Yes, your Honor.

BY MR. DALLAS:

Q I thought your testimony was if you were granted the incentive.

A If I was granted the incentive, that is my testimony, I would enlarge.

MR. DALLAS: No further questions.

THE COURT: You have nothing further?

REDIRECT EXAMINATION BY MR. JULIEN:

Q Would your profits increase?

A My profits would increase with the wholesale incentive.

Q You were asked about periods affecting sales. Is there anything in particular about the January period with respect to the sales of crash parts?

A Yes, in the general period I think we had many more accidents in the New York area and also included in our January sales are parts which were ordered by our customers during the month of December, during the period Ford Motor Company was closed for vacation. Those are included in our January sales.

MR. JULIEN: Thank you.

THE COURT: Step down.

(Witness excused.)

THE COURT: Any further witnesses?

MR. JULIEN: I move, your Honor, pursuant to Section 5 of the rules that our damage demand be ammended so as to include the period up to and including February 6, 1976.

THE COURT: I think I have already, in effect, granted that. Motion granted.

You rest on your damage claim?

MR. JULIEN: Yes.

THE COURT: Does the defendant have any witnesses?

MR. ZOLBERT: Yes, we do, your Honor.

MR. DALLAS: Your Honor, may I introduce, if he has not already been introduced to your Honor, William Zolbert of Ford Motor Company.

THE COURT: Thank you very much.

You are from Detroit?

MR. ZOLBERT: Yes. May I talk to the witness one moment?

THE COURT: Surely.

(Pause.)

W I L L I A M A. B E E R S, called as a witness by the defendants, being first duly sworn, testified as follows:

MR. ZOLBERT: I am from Dearborn. Some people are sensitive.

Your Honor, in case you do not recall who Mr. Beers is, Mr. Beers did testify before.

THE COURT: I recall him.

MR. ZOLBERT: Then we will skip his background and experience.

DIRECT EXAMINATION BY MR. ZOLBERT:

Q Mr. Beers, I would like to give you a copy of some documents that have been introduced into evidence, Plaintiff's Exhibit 1003, Plaintiff's Exhibit 1000--cancel Plaintiff's Exhibit 1000. We won't need that--and Plaintiff's Exhibit 1004.

THE COURT: Incidentally, Mr. Wasser, would you please have any ammendments to Exhibit 1000 ready quickly so we don't have to hold up the judgment this afternoon.

MR. JULIEN: It is ready now.

THE COURT: I didn't mean to interrupt you.

MR. ZOLBERT: If you wish to go ahead with that--

THE COURT: Can I see that?

(Document handed to the Court.)

THE COURT: Isn't there a way to make this clearer with a red pencil or something? It is a kind of jumble now.

MR. JULIEN: If you want the changes to be in red,

we can do that, your Honor.

THE COURT: I think you had better do something to make this clearer. Get the things marked out that should be marked out and have it clear what is left.

Go ahead, Mr. Zolbert. I am very sorry.

MR. ZOLBERT: I may ask one thing. We have done some calculations which we will get to in Mr. Beers's testimony which were based on the old exhibit. So, we will need to get that.

THE COURT: The changes aren't that big.

MR. ZOLBERT: Our basic points would still be clear.

THE COURT: You go ahead and do the best you can.

BY MR. ZOLBERT:

Q Mr. Beers, if you would look at Plaintiff's Exhibit 1003, please, have you examined that exhibit previously?

A Yes, I have.

Q And you will note that that exhibit states that what is called damage due to loss of profit using a level basis of sales are based upon the 1973 fiscal year.

Do you have an opinion whether, according to sound accounting principles, it is appropriate to use the 1973 fiscal year as a basis for computing these alleged lost profits?

A Yes, I do.

Q And what is that opinion?

A I do not believe it is proper to use fiscal year end '73.

Q And why do you believe that it is improper to use the 1973 fiscal year as the basis for computing the alleged lost profits in subsequent years?

A In computing the effect of a change, it is normal and logical that you would use--start with a period before the change occurred because you are trying to measure what happened before the change and after the change took place. Now, in this case, the period before the change took place was a fiscal year ending September 30, '72, and I believe that that is the proper base period to use for measuring the effect of this change on future years because it was not contaminated by the change.

Q Why, again, was 1972, fiscal 1972, the proper year as opposed to fiscal '73?

A Because all during fiscal '72 the incentive credits were passed to FLM, and starting November 1, 1972, incentive credits were not passed to FLM.

Q So that with the exception of the first month, there was no wholesale incentive passed to FLM in fiscal '73?

A That is correct.

Q Could you turn your attention next, Mr. Beers, to

Plaintiff's Exhibit 1004 and you will note in examining Plaintiff's Exhibit 1004 that pages 1 and 2 are a calculation of what are described as flexible expenses for the fiscal year 1974 and that on page 3 of Plaintiff's Exhibit 1004, where the net profit calculation is made, the figure with which Mr. Wasser began was gross profit for fiscal year 1972.

May I ask you, do you have an opinion as to whether, under sound accounting theory, it is appropriate to apply 1974 variable expenses to 1972 gross profit?

A Yes, I have an opinion.

Q What is that opinion?

A My opinion is that it is not proper to apply expenses of one year to the gross profit of a different year and arrive at a net profit rate. Sound accounting principles would indicate that you would measure the gross margin and expenses of the same year in arriving at a net profit rate.

Q It is your view, then, that it is not proper to use different figures from different years?

A That is correct.

Q If the starting point was the gross profit for fiscal year 1972, the variable expenses which should have been used should have been those of fiscal year 1972?

A That is my understanding and belief, yes.

Q Would you also direct your attention on that same page, right about in the middle of the page there is a line starts, "Less: flexible expenses," and there are a couple of parenthetical sentences in there, the last one of which is as follows: "(Based upon fiscal year 9/30/74, the mid-year of this report.)"

In your view, is it sound accounting--

THE COURT: Where are you reading, Mr. Zolbert?

MR. ZOLBERT: Page 3 of Plaintiff's Exhibit 1004.

THE COURT: All right.

Q In your opinion, or do you have an opinion, Mr. Beers, whether it is sound accounting practice, when examining an approximate three and a third year period, just to pick one year out of the middle as the figures which you will use?

A Yes, I have an opinion.

Q What is that opinion?

A My opinion is that you should use the year in which the gross profit is being used so that you have profit margin and the expenses that are related to each other. I found in examining statements of many businesses of this type that many times there is a relationship between gross margin and the expenses. A high gross margin generally followed by high expenses, low gross margins may result in low expenses because most of the selling effort is generated by low prices.

Q Mr. Beers, in examining the financial statements, have you found sufficient data--that there is sufficient data available to enable you to make a proper year-to year-comparison, in other words, apply variable expenses for 1972 against the gross profit for 1972 or any subsequent years?

A No, there is not.

Q So you have been unable to apply what you view to be the proper variable expenses to the proper gross profit?

A That is correct.

Q Now, if I may return to the first two pages of Plaintiff's Exhibit 1004, the calculaton of flexible expenses, you have examined that document?

A Yes, I have.

Q And do you have an opinion, Mr. Beers, as to whether the allocation of variable expenses done by Mr. Wasser is in accord with sound accounting theories?

A Yes, I do.

Q And what is that opinion?

A I believe there are expenses that are classified as fixed that normally are classified as variable expenses.

Q And would you read off which expenses those are that you feel should to some extent be allocated to variable?

A Generally there are expenses that I assume are included in other salaries that would be considered variable

expenses: delivery expenses, expense in the warehouse, handling material.

THE COURT: Wait a minute. You are now listing some things that are under the fixed category in Exhibit 1004 that should be under the variable category?

THE WITNESS: Yes, your Honor.

THE COURT: Could you start that again? What are they?

THE WITNESS: Some portion of other salaries. Other salaries--

THE COURT: Some portion of other salaries?

THE WITNESS: Yes, sir.

THE COURT: All right.

Q Which other items on the first page of Plaintiff's Exhibit 1004 should be allocated to variables?

A In my opinion, they would be expenses that are related to salaries, payroll taxes, probably workmen's compensation, disability insurance, group insurance. Those expenses I assume are related to salaries and therefore a portion of them should be considered variable.

Q Are there any other of the fixed expenses in the first two pages of 1004 that should be allocated to variable, in your view, that have not already been allocated?

A Not in my view.

Q You were in the courtroom during Mr. McKee's testimony, is that correct?

A Yes.

Q And you heard that testimony?

A I heard most of it, yes.

Q If I recall correctly, Mr. McKee testified that the category "other salaries" included what he paid his delivery people and people in the warehouse, et cetera. Is that the type of expense which you describe as being partially variable?

A Yes. The work load in those areas generally varies with volume.

Q And I believe Mr. McKee also testified on cross examination that while he had five employees up until the end of 1972, on January 1st he added a sixth employee and then he went from six to five in August of 1975. I believe that was his testimony. Is this also the type of thing that you were talking about?

A Yes, that would be the sort of thing that I have reference to.

Q Is there sufficient data available here in these documents, Mr. Beers, for you to allocate any portion of these items, other salaries, payroll taxes, workmen's comp and disability insurance and group insurance, to the variable

category?

A No, there is not.

Q You would need to know what the various individuals are paid and what they do to do that?

A Yes, sir.

Q Mr. Beers, have you made a calculation based on what you describe as the appropriate base year of 1972 in an attempt to determine the increase or decrease in FLM's net profit because of loss of the wholesale incentive?

A Yes, I have.

(Defendant's Exhibit BBB marked for identification.)

Q Mr. Beers, I have handed you a copy of what has been marked for identification as Defendant's Exhibit BBB. Is that the calculation which you were describing?

A Yes, it is.

Q I got ahead of myself. I would like to go back for one minute.

Mr. Beers, in discussing the variable expenses you stated that some of the other salaries and related expenses should be properly allocated to the variable category.

A Yes.

Q What is the end result or effect of the failure to calculate a certain portion of those fixed expenses into

the variable category?

A If more expenses were allocated to the flexible category, that would decrease the net profit rate on Schedule R.

Q In other words, on page 3 of Plaintiff's Exhibit 1004, the 26.4 percent net profit rate figure would be lower?

A That is right.

Q But you don't know by how much?

A No, sir.

Q Now, if we may return to Defendant's Exhibit BBB for identification.

MR. JULIEN: Before returning to that, your Honor, I think it only fair to note that here are computations prepared by an accountant which counsel has made no effort to serve upon us prior to this hearing. They certainly knew they intended to use it.

THE COURT: We will just do the best we can.

Let me ask you this, though. Let's look back at page 3 of Exhibit 1004, Mr. Beers. The item "flexible expenses, $28,313," that's just part of a ratio of that figure to the sales, right?

THE WITNESS: Yes, sir.

THE COURT: In order to find out a percentage, right?

THE WITNESS: Yes, your Honor. If there were flexible expenses, then the ratio would be greater.

THE COURT: Let's suppose you added--I guess we can do it by arithmetic. You have a calculator, I suppose. Suppose you added ten thousand dollars. What would be the increase in percent?

THE WITNESS: The percentage would be five and a half percent instead of 4.1.

THE COURT: All right. 5.5 percent?

THE WITNESS: Yes, your Honor. That would reduce the 26.4 to 25 percent even. Subtracting 4.1 from 30.5.

THE COURT: Reduce the net profit rate, so-called?

THE WITNESS: Yes, your Honor.

THE COURT: To what?

THE WITNESS: 25.0.

THE COURT: Go ahead, Mr. Zolbert.

Q Now, back to Defendant's Exhibit BBB.

Would you explain to the Court just what this exhibit demonstrates?

A This exhibit measures the actual sales for the fiscal years of '73, '74, '75, and for the period from October 1 through February 6, 1976.

Q If I may interrupt.

MR. ZOLBERT: That is the figure, your Honor, that

would be changed as a result of the changes Mr. Wasser made in Court today, to October 1st, 1975, through February 6, 1976, the fourth group of figures. It's near the bottom of the page. They would be slightly changed.

THE COURT: What would be changed?

THE WITNESS: 301,803 would be decreased by, I believe it was approximately $16,000 that the estimated sales were reduced in the January period.

MR. ZOLBERT: I believe the calculation, your Honor, was the $12,000 figure was about $10,000.

THE COURT: Yes.

Q Mr. Beers, let's just use as an example the fiscal year ending September 30, 1973.

Would you just go through what the various items are.

A Yes, we measured the difference between the actual sales in that period and the 1972 sales. There was an increase in sales of $61,980. We multiplied that by the net profit rate on the defendant's exhibit, 26.4 percent, to arrive at a profit figure of $16,363.

Q When you said 26.4 percent from the defendant's exhibit, you mean Plaintiff's Exhibit 1004?

A Plaintiff's Exhibit. I'm sorry. We did the same thing for each of the subsequent periods, measured the actual sales against the 1972 sales and then applied the net profit

rate to the difference to arrive at the effect, the profit effect, of this change.

Q And what then was the overall effect on FLM's net profit for the period from November 1st--excuse me--the fiscal years beginning October 1st, 1972, through February 6, 1976?

A This shows that the actual sales for that entire period were higher in total than the base sales for the same period, and when you apply 26.4 percent profit rate to that you would have an increase in that profit of $9,979 over the base period.

Q On this basis, on the basis of this analysis, Mr. Beers, does this indicate to you that the loss of the wholesale incentive allowance to FLM had any effect on FLM's profits in the period since the loss of that allowance?

A I don't know what affected FLM's profits or sales, but since sales increased so significantly in the year in which the incentive credits were not passed through, it doesn't seem to me that the failure to pass through incentives was a major factor in the sales.

Q Does this indicate to you, then, that some other factors were affecting FLM's sales?

MR. JAROSLAWICZ: I object to this.

THE COURT: I will receive it in evidence.

A There must have been some other factors that caused this increase, decline, and then a subsequent increase in the sales during this period because all during this period, except for the first month, there had been no incentive credits passed through, as I understand.

MR. ZOLBERT: Excuse me one minute, your Honor.

(Pause.)

THE COURT: What do you mean by an increase in sales? Even using 1972 as the base period, '74 was certainly--fiscal '74 was down by 41,000.

THE WITNESS: Yes, your Honor. 1973 was up by 61,000.

THE COURT: I thought you were testifying that there was some consistent growth or increase. There was an increase in '73 over '72, right?

THE WITNESS: That is right, yes.

THE COURT: In sales. But there were decreases '74 and '75 versus '72 sales, right?

THE WITNESS: Yes, your Honor.

THE COURT: And you got all that measured. And then for the period October 1, '75 through February 6, '76, you have just prorated the annual '72 sales, right?

THE WITNESS: Yes, sir.

THE COURT: I understand what the exhibit says.

THE WITNESS: But what I meant to testify was that for the entire period, the sales for the entire period, the three years and four months are greater than three years and four months of 1972 sales. That is what I meant.

THE COURT: You mean if you totaled --

THE WITNESSES: The increases are greater than the decreases.

THE COURT: If you totaled?

THE WITNESS: Yes, sir.

THE COURT: All right.

MR. KOLBERT: I offer Defendant's Exhibit BBB in evidence.

THE COURT: Any objection?

MR. JULIEN: No.

THE COURT: It is received.

(Defendants' Exhibit BBB for identification received in evidence.)

THE COURT: Any further questions?

MR. KOLBERT: No further questions, your Honor. However, to protect the record, I would like to move to strike Plaintiff's Exhibits 1003 and 1004.

THE COURT: Motion denied.

Do you have any cross?

MR. JULIEN: Would you afford me a few minutes?

gwjl

I am reading this for the first time.

MR. ZOLBERT: I might add that this exhibit was not completed until about 2 o'clock.

THE COURT: Don't worry about that.

The difference is perfectly apparent. This witness has made calculations. They are perfectly valid calculations. The arithmetic is fine, and the question is whether--I don't even think there is any matter of examination. The question is, does the Court find that there was an effect from the depravation of the wholesale allowance, does the Court find that there was an effect upon sales commencing in 1974.

Now, Mr. Beers wasn't there. He doesn't purport to be there. I don't know what reason we have to really cross examine him about.

MR. JULIEN: I had that in mind, if your Honor please.

THE COURT: All right.

MR. ZOLBERT: It is our position that Mr. Wasser's calculations--

MR. JULIEN: I can't confer.

THE COURT: You just wait. We'll have your argument in a minute.

(Pause.)

THE COURT: Who has what?

MR. ZOLBERT: Your Honor, if I may just respond to the last comment before Mr. Julien commences his cross examination.

As you know, Mr. Wasser's calculations were based on 1973 fiscal year, which, as Mr. Beers explained and we all know, is the first year after the loss of the incentive. It is our view that that was an improper base, that the proper base on sound accounting theory is the year that they last had--

THE COURT: I heard him.

All right, Mr. Julien.

MR. JULIEN: I will be very brief.

THE COURT: I am not trying to cut you off. Some questions have occurred to me. You take your time.

CROSS EXAMINATION BY MR. JULIEN:

Q Mr. Beers, have you been told that there has been testimony here that overall the incentive allowance permissible on crash parts will come to about 12 percent of the gross sales of my client? Are you aware of that?

A Yes, I am aware of that.

Q So even on the figures which you project the plaintiff in this case would have an additional 12 percent of his gross sales as additional profit to him over and above your figures?

A I don't believe the schedule 1003 has anything to do with the effect of incentive itself on profits. That I understood is in the other exhibit which added up to 248,000.

Q Mr. Beers, just so we can move as quickly as possible, even on the figures which you project in your last exhibit, BBB, over and above the profits that you show there would be an approximate 12 percent of sales as additional profit to my client which it did not receive because it did not have this incentive, is that so?

A Yes, sir. And either your schedule--

Q That is the answer. Are you acquainted with the fact, as a result of your participation in the work of the Ford Company, are you acquainted with the fact that there have been sizable increases in the cost of crash parts during the last few years?

A I am aware that there have been increases in the cost of parts. I am not aware of the magnitude of them.

Q As somebody who works in this field, are you acquainted with the recent news items, as recent as February 29--

MR. ZOLBERT: Your Honor--

MR. JULIEN: This is cross examination, if your Honor please.

MR. ZOLBERT: Not with newspaper articles.

THE COURT: What does it have to do with his direct? He didn't testify about anything about costs.

MR. JULIEN: No, your Honor. I address myself to this for the purpose of showing that the increases in sales as shown in his figures do not--in his evalution does not take into consideration the fact that there has been a huge increase in the cost in the sales price.

THE COURT: Neither did your man take that into account.

Look, the testimony is uncontradicted basically that there have been increases in the cost of crash parts. This is completely unrelated to the testimony of this gentleman who is now on the stand. He just testified as to certain things about normal accounting methods. The question really is, whether what would seem logical accounting methods apply in this case, and it may be a little more complicated than you would use in normal accounting methods. His testimony is about method, really.

MR. JULIEN: That's true. I thought we could use his expertise to once again buttress the fact there has been a huge increase in cost of crash parts. If you think not--

THE COURT: It is uncontradicted. I don't know about the word "huge," but Mr. McKee has testified what he has testified. There is no contradiction on that.

MR. JULIEN: With respect to the methods employed, your Honor, as to that, I will call Mr. Wasser back to the stand.

THE COURT: Mr. who?

MR. JULIEN: Mr. Wasser.

THE COURT: I am going to ask you some questions, Mr. Beers.

BY THE COURT:

Q You made some comments on Mr. Wasser's methods in his Exhibits 1003 and 1004. I think that is what you commented on. Didn't you?

A Yes.

Q Now, I want to ask you the following: were you assuming that the effect, whatever it was, of the withdrawal of the wholesale incentive allowance occurred vis-a-vis FLM at about the time the incentive allowance was withdrawn? Was that your assumption?

A I assumed that the incentive credits were not passed through to FLM starting November 1, 1972, which I believe is the date that they have used. That is my assumption.

Q In your Exhibit BBB you use as a base period 1972, right?

A Yes, sir.

Q And you use it for sales, right?

A That's right, your Honor.

Q So one of the main things you have talked about in your exhibit and Mr. Wasser talks about is sales, right?

A Yes, your Honor.

Q Okay. That's obvious.

So you must be aware that we are interested in determining, for purposes of this exercise, something about when it was, if ever, that the wholesale incentive allowance had an effect on FLM's sales, is that right?

A That is right, your Honor.

Q And your Exhibit BBB assumes that this occurred right after the end of fiscal '72, right?

A Yes, your Honor.

Q Let's assume I would find as a fact based upon all the evidence in this case that there was a delayed reaction on sales. I am not talking about net profit now. Are you with me?

A Yes.

Q And that because of a delay, so to speak, in the competition lowering its prices, because of a delay in the effect of capital shortages, or whatever, let's suppose that I would find that on all the evidence in this case there was a delayed reaction and that reaction didn't set in until 1974 fiscal. Do you understand my supposition?

A I understand.

Q You may disagree with it, but just take that as a possibility, a hypothesis. Okay?

Now, let us assume that for my purposes I am interested in determining what profit would have been earned if the '74 sales had remained at the level of the '73 sales. Now, if that is my purpose, and I am setting out my base year will be '73, will it not?

A Yes, your Honor.

May I say something?

Q No. Just a minute. You follow me. I want to ask you a question about method under my hypothesis.

A Yes, sir.

Q They may be right or they may be wrong, but I want to stick with them for the purpose of illustration.

Under my hypothesis I would be comparing '74 sales with '73 sales. Are you with me?

A Yes, sir.

Q Let's assume the difference is roughly $100,000 and let's further assume I need to try to find out what would be the net profit on that $100,000 differential that would have been earned in 1974. Do you still understand me?

A Yes, sir.

Q And let's assume further that I am interested in

figuring out what that net profit would be if the wholesale incentive allowance had been in effect. Do you still understand me?

A Yes.

Q Now, you tell me how I am to do that.

A I believe you should measure the net profit rate you would use to apply to the $100,000 of lost sales should be the gross margin for 1973. That's your base period.

A But in 1973 there was no wholesale incentive allowance in effect for FLM, so if I used the gross profit for 1973 I would be using a gross profit that didn't have the wholesale incentive allowance in it.

A That is correct, your Honor, but--

Q So I can't use the 1973 gross profit percentage, can I?

A I believe you can, sir, because you are assuming in your assumption, you are saying the fact that they did not get the pass through of the wholesale incentive credits had no effect on the sales in '73. So, if that is the case, then it seems to me you should look at the gross margin that they were actually achieving in 1973, because obviously they had the higher material cost and if it didn't affect them in 1973 it seems to me they should be able to do the same thing in '74.

Q No. Don't we have to be careful on what we are

talking about as being the effect? My hypothesis is that sales were not affected during '73. Sales. Are you with me?

A Yes.

Q But the figures in dollars and cents show that profits were affected and they naturally would be. You recall the figures?

A I know profits were affected.

Q Of course they were because they had a lot less margin. In other words, you can have an increase in sales but your margin is smaller so you have less profits; that's possible, isn't it?

A That's right.

Q Isn't that exactly what happened?

A I believe so.

Q And the reason was--well, let us assume that the reason was that they didn't have the wholesale incentive allowance. I will ask you to assume that.

A That could cause a decrease in their profits--a decrease in their margin.

Q And a decrease in their profits?

A Yes.

Q Same thing. I go back to my question to you. I want to calculate how much of the $100,000 so-called decrease that occurred in '74 under my hypothesis, I want to know how

much of that would have gone down in net profit and I want to include in that calculation an assumption that the wholesale incentive allowance is granted. I go back to you and ask you how you do that. I don't see how you can do that by starting with a '73 gross profit margin because it doesn't have the wholesale incentive allowance in it.

A I think the way you could do it would be to look at the wholesale incentive separately and apply that rate to the $100,000, if you wanted to do that.

Q How do you do that with these figures? I have the figures and I think they are accurate, the ones in my decision. Look at page 27 for the '73 figures and page 16 for the '72 figures. Maybe you have them.

A No, I do not.

Q 16 and 27. Are you telling me that you would take the gross profit margin for '73 and then you would increase it by an amount to take into account the granting of the wholesale incentive?

A No. Under your hypothesis I would just apply the wholesale incentive rate to the sales, period.

Q You just tell me the whole step, how you would do it. You start with $100,000.

A I would apply the 12.7 percent to that.

Q To what?

A To the hundred thousand.

Q Let's start at the beginning. You have $100,000 sales that I say involves this decrease, right?

A Yes, sir.

Q I want to find out how much of that would go down in net assuming the granting of the wholesale incentive. Just take me through the steps and show me how to do that.

A Well, I believe you first apply the 1973 gross margin, the actual gross margin, to the 1974 business.

Q You can take all the time you need with a sheet of paper and make those calculations. I have the figures on page 16 and 27.

A I would have to think about it. This is a new concept to me, trying to follow your reasoning, your Honor, and figure out how that would affect profits. I am having difficulty in my mind following your reasoning through, if you please, because I think it is difficult to separate the fact that you either had wholesale incentive or didn't have wholesale incentive during the period. It seems to me--

Q Have you tried to evaluate Mr. Wasser's calculations with my problem in mind?

A No, sir, I have not.

Q In other words, your critique of Mr. Wasser's calculations was based solely on the idea that 1972 would be

would be the proper base year, is that right?

A That is right, your Honor.

THE COURT: I guess that's it. Any further questions?

MR. ZOLBERT: Yes, sir.

REDIRECT EXAMINATION BY MR. ZOLBERT:

MR. ZOLBERT: Just a couple of questions, your Honor.

THE COURT: All right.

Q On cross examination, Mr. Beers, Mr. Julien asked you about whether there would be that extra 12.7 percent which he stated was FLM's wholesale incentive and that was the figure you included in your colloquy with the Judge.

Isn't it true that there would be a cost of calculating the wholesale incentive which would have to be taken into account?

A That would certainly be a cost, a normal cost, of doing business, yes.

Q So if the wholesale incentive had been available to FLM during the period subsequent to November 1, 1972, FLM would have had to prepare claims and they would have had the cost of preparing those claims?

A Yes, I understand that they would.

Q So then FLM would not get the full benefit of 12.7 percent but some amount less than that?

MR. JULIEN: I object to that, if your Honor please.

THE COURT: Objection overruled.

Q Is that correct?

A That is correct.

Q And even if there were no costs of calculation, Mr. Beers, calculating the wholesale incentive, isn't it also true that that would be dependent upon the dealers who supply FLM passing the entire wholesale incentive on to FLM?

MR. JULIEN: I object to that, if your Honor please.

A No, sir.

MR. JULIEN: Just a moment, if you please. All this is testimony by the lawyer, not by the witness.

THE COUPT: Sustained. I think this is kind of argumentative.

MR. JULIEN: I move to strike the answer.

THE COURT: Motion denied. I will let it stand. I don't think it's awfully helpful.

MR. ZOLBERT: Your Honor, we have no further questions of Mr. Beers.

THE COURT: Do you have anything?

MR. JULIEN: Just one.

RECROSS EXAMINATION BY MR. JULIEN:

Q Mr. Beers, are you in a position to state how much additional expense would be expended by my client in

securing this wholesale incentive which he had had prior to the--

THE COURT: He said if there would be additional expenses it would be additional expenses. You don't know how much it was?

THE WITNESS: I don't know how much they spent, no, sir.

MR. JULIEN: That's all.

THE COURT: Thank you very much, Mr. Beers.

BY MR. ZOLBERT:

Q Mr. Beers, have you made a general computation of what would be the cost to prepare the wholesale incentive claims?

MR. JULIEN: I object to that. This is a firm doing business. It did in the past. They figured wholesale incentive in the past.

THE COURT: I really thought--are you on redirect now?

MR. ZOLBERT: Yes.

THE COURT: That is something you want to introduce into the case and it is a little late.

Do you have a calculation of that kind?

THE WITNESS: Yes, sir.

MR. ZOLBERT: Your Honor, I might add the reason

we did not use this before, this was something that was done in connection with what you stated at the beginning of the session this afternoon you would not allow as a cost, an accounting cost. We had done some calculations last night in the event that your Honor was going to consider that cost. We were going to offer what we thought the cost was.

THE COURT: I thought, Mr. MacCrate, you wanted to put it in on the issue of damages aside from recovering accounting costs. You can do it, but I don't know that this man--you want to let that go?

MR. ZOLBERT: It's all right. The only reason I raised it because Mr. Julien asked the questions.

THE COURT: His questions don't open that up.

Thank you very much, Mr. Beers.

(Witness excused.)

MR. ZOLBERT: Mr. Dallas has a statement.

MR. DALLAS: With the Court's indulgence, hopefully to avoid the necessity of burdening the Court and my colleagues with another brief, there are a few points that have been raised in the colloquy you had with Mr. Beers that I would like to call to the Court's attention based on evidence that has been presented in the record at the earlier trial back in 1974.

MR. JULIEN: This hearing has not concluded. I have Mr. Wasser for just one question.

MR. DALLAS: I'm sorry. I misunderstood that.

THE COURT: Okay.

MR. DALLAS: I'm sorry.

D A V I D W A S S E R, resumed.

DIRECT EXAMINATION BY MR. JULIEN:

Q Mr. Wasser, why did you use for comparison purposes the year '73 and sales in '74 rather than the year '72 when the incentive allowance was discontinued for FLM?

A The effect on the working capital and surplus took its effect after the close of '73. At 9/30/72, the earned surplus was approximately $100,000. At 9/30/73, it was down to 18,000, and there were no funds, working capital, for the company to operate properly.

Q Then is it your point it took some time before that effect reached your client?

A Yes.

Q And was that in accordance--your selecting that period, was that in accordance with good and accepted accounting practice?

A Yes.

MR. JULIEN: That is all.

MR. DALLAS: I have one or two questions based on that.

CROSS EXAMINATION BY MR. DALLAS:

Q Mr. Wasser, after November 1, 1972, when FLM was no longer receiving incentive allowance, what steps are you aware of that FLM took to reduce any expenses or overhead that they might have had?

MR. JULIEN: Objected to as not proper cross. It has nothing to do with the subject I introduced.

MR. DALLAS: Your Honor, it is directly related to their reserve capital, the necessity for having expenses to cover. It seems to me that is directly relevant.

THE COURT: I will allow it.

A The expenses, such as rent and salary and the basic expenses, could not be reduced significantly without the company going out of business. What they did reduce was what was possible to reduce, the officers' salaries, we reduced the pension fund, the deferred profit sharing fund, but you can't reduce the rent.

Q Did you reduce the number of employees?

A There had to be a basic number of employees.

THE COURT: It's already in the record.

Q Those were the only things you undertook to limit your expenditures?

A Every possible step was taken, but the statements previously submitted were after an effort and a lot of discussion and meetings to see what could be done to save the

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company.

MR. DALLAS: I don't believe I have anything further.

THE COURT: You may step down.

(Witness excused.)

THE COURT: You had some argument.

MR. DALLAS: Yes.

Your Honor, it seems to me there are two fundamental issues of damages we are facing and unfortunately I found myself a little bit confused and perhaps, hopefully, your Honor is not, but I want to segregate them. One is the amount they would have received had they been getting the incentive allowance, and we have had testimony from, I believe, Mr. McKee that that pretty much represented their profit margin on their sales. So, for actual purchases made they are going to be fully compensated for any profit that they would have earned, assuming they had gotten the entire incentive allowance by the award of the incentive allowance on their actual purchases.

THE COURT: That is on actual purchases.

MR. DALLAS: That is right.

The second element, as I understood your Honor's concern, is their evidence they would have had additional sales but for the failure of FLM to receive the incentive

allowance on purchases from franchised dealers. That seems to be the inquiry on that point.

THE COURT: Yes.

MR. DALLAS: Thank you, your Honor. There are several points there I would like to call to your Honor's attention that are relevant to that. First, your Honor raised a concern that it seemed like there was a dip in sales in 1974, as indeed there appears to have been. We had testimony, if your Honor will recall, where Mr. Roland testified, and this is at page 462 of the testimony, that crash parts, during the year 1974, had shown a decrease in sales of approximately 7 percent.

Your Honor will also note that there was in the record from, again, Mr. Roland, at pages 610 to 611, that during the same period, 1973 to 1974, there was a gas shortage and there was a resulting fewer crashes, perhaps in part due to the reduced speed limit of 55 miles an hour. Mr. Roland testified at that point he couldn't ascertain what the precise factors were, but that nevertheless there were fewer crashes and there was a gas shortage.

We also had testimony from Mr. McKee that in periods of economic adversity straightening is always an alternative to a customer. Instead of replacing a part he will have a body shop repair it, straighten it, rather than replace it.

gwjl

You will find that testimony at page 485 of the record.

In addition, your Honor, other extrinsic factors that seem to make an ascertainment of what if any loss there could have been because of inability to obtain the incentive allowance is clouded by the fact Mr. McKee has faced intense discounting by competitors in his area and this discounting has not only been with respect to crash parts but he testified, at least as to one franchised dealer, he was selling overall across the board, discounting all his crash parts. The ironic thing, if I could make a brief aside, this is indeed what the FTC was endeavoring to do when they suggested to Ford Motor Company that it institute this policy.

THE COURT: It is a lot easier for the Ford dealer to follow the FTC's policy than it is for FLM. It is not a concern of mine in this case whether the Ford dealers carry out the policies urged by the FTC or not. That is not my particular concern. That I assume if they see fit to take action they will. It is not my concern. But the point is that the only point I am concerned about as a result of my decision is having FLM and the Ford dealer in an equal position or at least have equalization of the prices charged to the Ford dealers insofar as their dealings with FLM are concerned.

MR. DALLAS: Your Honor, my point was not--

THE COURT: If the Ford dealers are now discounting,

they can discount. That may be fine, but the point is they are economically far better able to discount than FLM is able to discount.

MR. DALLAS: That's correct, your Honor. The point I am trying to make is they are discounting which is at least in part independent of the incentive allowance. We have Exhibit 1006, your Honor, which I endeavored to understand from Mr. McKee what the discounting practice of Empire Motors was. It appears they weren't discounting from the incentive but from list price.

Similarly we have the Jackson Motor Company--

THE COURT: I don't think you really understood that.

MR. DALLAS: The point is, your Honor, if price competition with competitors is a factor in taking business away from FLM, that has absolutely nothing to do, your Honor, with the availability of the incentive.

THE COURT: When a fellow gets a lower price he is better able to cut his sale price. It is a fact of life.

MR. DALLAS: It is true. But there is evidence here there is one dealer who is cutting his price across the board.

THE COURT: He can far better afford to cut it across the board because he has got that cushion provided by the wholesale incentive allowance on part of his parts. I

get your point.

MR. DALLAS: I don't want to belabor that point. There is the additional point in the last four months FLM has seen a substantial increase in their sales revenue because of the higher price, apparently, on crash parts, an additional factor that has absolutely nothing to do. The fundamental factor, however, your Honor, and this is the one I wish to emphasize, is Mr. McKee has just stated on the stand that the volume of his sales is based upon the number and severity of crashes. It has absolutely nothing to do with the incentive.

Now, that is a factor--

THE COURT: Please, as a lawyer, you should not stand before me and give me completely unrealistic arguments. I am not an idiot. He never so testified. He said he lost sales, he lost customers because of price. It is the only reason he has ever lost a customer. So you are completely ignoring that phase of his testimony.

Maybe there is a matter of credibility, but don't stand there and tell me he has just testified that it has no effect.

MR. DALLAS: With all deference, your Honor, I am simply stating with respect to the volume of sales he testified that that has remained the same. I believe the record will so reflect.

Also, the factual background I just wish to present to your Honor.

THE COURT: Let's go to something else.

MR. DALLAS: The legal background and accounting background I will touch on. You just heard Mr. Beers. I won't belabor his testimony.

THE COURT: I heard him. I have to work on an injunction here.

MR. DALLAS: I understand that. The last point I want to make is that as a matter of law, when one is attempting to recover lost profits, the relevant period of time to measure the lost profits is, as the Supreme Court said in Eastman Kodak against Southern Photo, which is at volume 273 US page 359, the Court there stated that you use the period immediately preceeding the period in which you claim an anti-trust violation. If your Honor would like--

THE COURT: I would appreciate--one problem in this case is the lack of analysis. Let's analyze. I haven't read your case, but did that deal with the situation of a delayed reaction? You may not agree there was a delayed reaction, but if you want to help me on the law, you have got to assume--you have got to get a case that meets the problem that I have raised. I may be wrong on the facts, you may win in the Court of Appeals, but you are not going to help

me unless you deal with the problem that I feel I have got to grapple with. I feel I have got to grapple with--and this has been apparent, you know, since December 19th or thereabouts, and it is a problem presented by the testimony. I know, any fourth grader would know, that if the effect of an anti-trust violation starts on November 1, 1972, I take for comparative purposes before that. On the other hand--that is so obvious it doesn't need saying, it doesn't need a case or anything else, but if for any reason the reaction is delayed because of the price cutting doesn't occur right away by the competition or because there is a cushion of working capital and it doesn't occur for a year or two years, then I don't think I can apply that simple proposition.

Now, what does your case deal with?

MR. DALLAS: Maybe if I breifly touch the facts. It is somewhat similar, although I confess it doesn't deal directly with the concern of a delayed reaction. I have not seen a case, quite frankly, that has presented that problem.

THE COURT: That is my problem, so you address that.

MR. DALLAS: I am at a loss to address that with case citation.

THE COURT: Don't address it with a case that doesn't

apply.

MR. DALLAS: This case applies to a situation where a customer has been cut off by a supplier. This was a case in which a photographic dealer, wholesaler, had been cut off by Kodak and claimed it was for monopolistic purposes. This is a case cited by plaintiff in support of their case. It is a Section 2 case.

One of the issues faced by the Supreme Court was the proper measure of damages and the Court endorsed the plaintiff's approach in that case, which was to measure the damages by the period preceeding the anti-trust violation.

We submit, your Honor, that is the only appropriate measure sanctioned by law. That's it. Thank you for your indulgence.

THE COURT: Let's deal with this injunction.

MR. JULIEN: I am not answering the argument. I will save it for my brief. We are tight on time. Did you say by the end of--

THE COURT: You said 48 hours.

MR. JULIEN: Could you make it Friday?

THE COURT: Yes. I think that the only thing I can use, really, as a model for the injunction, is the form prepared by Sullivan and Cromwell. I would appreciate getting that firmed up as to form right now, if we could, and then

somebody could retype it and submit it so I am ready to sign it.

I would like to ask a question which hasn't bothered anybody heretofore, but I don't want it to be lurking. And that is, the situation as to the fact there are two defendants named in the action.

For convenience purposes, I referred in my decision to both defendants as Ford, but when we get to an injunction I think we had better be accurate.

As I understand it, since the time the trial of the action was completed, the first sessions in September and October, 1974, Ford Marketing Corporation is dissolved and is just--the marketing arm of Ford is simply a division again, is that right?

MR. MAC CRATE: At the close of business, your Honor, on December 31, 1974, Ford Marketing Corporation was merged into Ford Motor Company.

THE COURT: Could I suggest this, that at the end of the preamble we recite--I am just trying to think of the mechanics. I don't know how quickly you are going to get the record of today's session. Maybe you could get the record of what we are doing now so you could get the material to redraft the injunction.

MR. JULIEN: It is now a component part of the

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major party so how is anybody hurt if we continue to carry the style of the case as it is presently stated?

THE COURT: Just bear with me. For some reason it bothers me to enter injunctions against entities that don't exist. Maybe I'm wrong. I think it will help to clarify it to this extent. I am going to give Sullivan and Cromwell back my copy of their proposal and it is marked up with some changes and some I would like to dictate into the record now, if I couid.

I will mark Rider A, and Rider A is part of the preamble and it will read as follows:

"anddefendant Ford Marketing Corporation, having been merged into Ford Motor Company as of December 31, 1974,"--

MR. JULIEN: Could you tell us where that insertion goes?

THE COURT: I have marked it here. I have marked it Rider A. I have made some other changes here that I don't think I need to discuss with you. I don't think they are any particular problem.

I would like to discuss what is--I am going to delete paragraph 3 of the Sullivan and Cromwell order. I am going to move paragraph 1 up so that it becomes part of the preamble, so the result is if you mark paragraph 2, the bottom of the first page as 1 andthen the present paragraph 4 becomes

paragraph 2.

Now, again, maybe it makes no difference to anybody, but I don't want to have something lurking. My findings really were on the part of personnel of Ford Marketing Corporation, and does it make any difference to the defendants whether we specify or whether we use "defendants," plural, or does it make any difference or no difference, Mr. Mac Crate? For instance, I specifically found there was no conspiracy between Ford Motor Company and Ford Marketing Corporation, and I don't want to slip unknowingly into some kind of a use of plural when we should have the singular.

MR. MAC CRATE: Your Honor, on page 2 in that recital, as you know, technically that would be Defendant Ford Marketing Corporation, having been found to have discriminated." We were simplifying the order to speak to today but since your Honor's finding was as of the time when it was a separate corporation, Ford Marketing Corporation, I suggest that is how it should read.

THE COURT: I think it really should. I don't think there was any evidence in the record at all of any activity at the crucial times, and I meant the--let me start again.

I don't think there was any evidence of any activity by anyone connected with Ford Motor Company itself that Ford Motor Company people had anything to do with the revision

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of the wholesale incentive policy. I think that all the evidence related to Ford Marketing Corporation people. They are the people that issued the price lists and make these policies and so forth. Am I wrong?

MR. MAC CRATE: As of that time, your Honor, it was entirely by Ford Marketing.

THE COURT: At the earlier time when they were granting the wholesale incentive allowance, of course, the marketing was an arm of Ford Motor, but I am talking about the time of the changes in '72 and '72. It was Ford Marketing Corporation. So I will, I think, for the sake of the order, be precise on that.

Now, going back to what I have renumbered paragraph 2 at the top of the page, I would like to have this reworded as follows:

"Ordered, adjudged and decreed that the plaintiff has proved its cause of action against Defendant Ford Marketing Corporation (now merged into Ford Motor Company) for violation of Section 2A of the Clayton Act, as amended by the Robinson-Patman Anti-discrimination Act, 15 USC Section 13(a), and the Plaintiff, having proved damages for such violation in the amount of dollar sign blank, the Plaintiff is entitled to recover treble that amount against Defendant Ford Motor Company pursuant to 15 USC Section 15."

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That's the end of that paragraph 2.

I will make a change in the preamble to the injunction part.

We don't have to keep talking about the merger. I think we just have to put in Ford Marketing Corporation instead of Ford Motor Company, isn't that right, Mr. MacCrate, isn't that what you suggested?

MR. MAC CRATE: I believe so.

THE COURT: Ford Motor instead of Ford Marketing.

Ford Marketing is the one that distriminated. This is a historical statement.

MR. JULIEN: I am a trifle troubled, unless counsel will state for the record that he is not making any point about the fact that the violations were committed by Ford Marketing Corporation and the injunction is addressed to Ford Motor Company.

THE COURT: That's the way I am going to phrase it. It's got to be phrased that way.

The judgment will be against Ford Motor Company because the guilty defendant is merged into Ford Motor Company. It's as simple as that.

MR. JULIEN: I am assuming that injunctive relief runs against Ford Motor Company.

THE COURT: If you will give me about two seconds.

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MR. JULIEN: I beg your pardon.

THE COURT: The last paragraph at the bottom of page 2 is difficult. I would like to suggest this language. Give me just a minute.

(Pause.)

THE COURT: Let me try this. I think that the intent of Sullivan and Cromwell's last paragraph, as far as form, is getting there, but I think--

MR. MAC CRATE: May I explain what we were addressing?

THE COURT: Yes.

MR. MAC CRATE: Since, your Honor, this speaks to third parties, franchised dealers, and we were attempting to establish a workable system so that FLM could go to any of the franchised dealers, make the request for purchases and make any arrangements with respect to this that they might make, we were putting in the language that has regularly been used in the price list and in the manual that were a part of the record in the case, and the choice of language here on the terms and conditions and such wholesale allowance is granted to such dealers on the sale of crash parts "Eligible customers" is the language out of that manual, and we were placing it in pari passu with the situations as they operate in real life of the relations between Ford and the

franchised dealers.

MR. JULIEN: Your Honor, I am slightly opposed to having any decree of this Court subject to language contained in any of the written material of the defendant. By the simple ruse of changing their definition, in their procedures and in their policy manuals, they can in effect negate the provisions of this Court's order, and I am distressed that any such power of revision exists on the part of a litigant when it is this Court that defines what the rights of the parties are.

THE COURT: I am not worried about that. I think that would be kind of bad faith that I don't think it can even be suggested Ford would undertake and if it did in some strange way, it can be easily remedied by the Court in just tightening up the terms of the order.

The thing that bothers me, Mr. MacCrate, is this: I am not worried about skullduggery or anything like that, really. I am just worried about this, and it is not a terribly big thing, but there is a kind of implication in your paragraph that FLM is not an eligible customer, FLM is in some other category. I don't think you mean to have it. If my decision is right, you are not trying to evade it by your terms, but I would prefer some other type of wording, frankly, and I would--the intent that I would like to see carried

out in the order is this: that whenever and to whatever extent a wholesale incentive allowance is granted for Ford dealers reselling to anybody, FLM has to get it. That's really the idea.

Let me try this language.

MR. MAC CRATE: This language accomplishes it.

THE COURT: Except there is an implication here I don't like in the wording.

MR. MAC CRATE: Could we insert the word "others" before "eligible customers" so that it would have the effect, therefore, of making it appear on the face of this order that it is an eligible customer.

THE COURT: That is acceptable. Okay.

Let me just--I will do a little marking and then I will give this to you.

You couldn't put this into effect, say, April 1st? You may get a stay or something, but barring that is there any reason why it can't be as of April 1st?

MR. MAC CRATE: Mr. Zolbert can speak to that.

MR. ZOLBERT: All I can say is, based on my past experience in the company in trying to get things like this, the letters that would be required, processed and printed and distributed, I doubt it could be done by April 1st. I would have to check it.

THE COURT: April 10th?

MR. JULIEN: The letters could wait until April 10th, but there is no reason why the procedure which is mandated in the order can't take place.

THE COURT: There are only two or three dealers. I will say commencing no later than April 1st. I think you can do it.

I have made some changes. I put the words "any other" before "eligible customers" and I have said that I have made some other minor changes as you can see.

MR. JULIEN: Before you leave that paragraph, your Honor, I think you are encountering something that can be very difficult and perhaps something we should not encourage when you allow any term to be defined by the Ford's own manual.

THE COURT: If Ford decides to withdraw the wholesale incentive allowance entirely, then they can do it. My order, though, says FLM is to get it on the same terms as granted to any other eligible customer.

I don't think Ford is going to start--I don't have anything on my record, Mr. Julien, to indicate Ford has different wholesale incentives for different classes of customers. They have one single method of dealing with all the so-called eligible sales. Right, Mr. MacCrate?

MR. MAC CRATE: Yes, your Honor.

THE COURT: Let me cut it short. I think Mr. MacCrate's wording is clear-cut and what I tried to figure out was not as good, what you tried to figure out is not as good and I am going to use this.

MR. JULIEN: I am only concerned with the fact this permits the defendant to define this term "eligible customer."

I have to deal with this case as though perhaps your honor will retire two years from now and get into private practice, I come before another judge and as this judgment reads, it seems to be permissible to Ford by simply changing who are their eligible customers in their own definition to cause irreparable harm once again to us.

Your Honor knows what you have in mind, but your successor may not be quite so clear upon it.

THE COURT: The only thing I could change is to say "the most favored eligible customer," but Ford doesn't favor one eligible customer over the other.

MR. JULIEN: That is now.

THE COURT: I can't enter an injunction on a non-existent record.

MR. JULIEN: If you say "most favored customer," that's fine.

THE COURT: I am not going to enter that. Please,

let's suspend this. I have to deal with a record that is made, not some speculation.

I guess that the next paragraph really is not-- I think just change the date.

The only thing I have done there of any substance, I have said no later than April 1st. We are now at March 2nd. You can get your thing going.

MR. ZOLBERT: Mr. Julien stated when I got up last time he had no objection if the letter went out even subsequent to the time that the dealers became eligible for it.

THE COURT: Let's have the order make some sense. You can get it out. You have thirty days.

I will give this to you gentlemen.

MR. JULIEN: I have a number of things to call to your Honor's attention.

THE COURT: What is that?

MR. JULIEN: As I read it, there is no provision in there for costs and attorneys' fees.

THE COURT: You are absolutely right. Let's add, then, to paragraph 2--I have added that, Mr. Julien. Thank you.

MR. JULIEN: In the first paragraph of the preamble, I am troubled by the attempt of our opponents to make some kind of statement that the record on damages was

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inadequate.

THE COURT: I'm sorry. I should have told you, I have struck out the words "determined that the record on damages made at this trial was inadequate to support any award."

That was their argument. I have stricken that out.

MR. JULIEN: Do you have my proposed order before you?

THE COURT: Yes.

MR. JULIEN: I would like to call your particular attention to items 4, 5, 7 and 8, which I think are really necessary to make sure that this judgment is lived up to and its intent and purpose that I think the trial court has in mind.

THE COURT: Let me cut this short. I have found, in effect, that aside from cutting off the wholesale incentive allowance, Ford did nothing else. I have found that Ford was not responsible for disturbing the business relationship between FLM and Atlas except by the bare naked fact of withdrawal of the wholesale incentive allowance. I have no reason whatever to believe that Ford is withholding parts from Pleasantville or whoever they are dealing with now.

I don't want to put in a lot of language into an order which is not made necessary in my view by the record before me, because there are lots of implications from putting

this language in. I am just not going to do it.

MR. JULIEN: If that situation arises then I guess we will have to be back.

THE COURT: Absolutely. I don't think it will arise.

MR. JULIEN: I hope not.

In our memo we are going to talk once more about allowing this definition of Ford's manual to have some control.

THE COURT: This is settled tonight. I want to sign this order tomorrow. I would appreciate your getting it typed up and getting it to me and that phase of the case is over with, and then we assess damages--I guess I can't because it's a judgment. Please get it in to me and I will be ready to sign it the first of next week.

MR. JULIEN: You would appreciate I have not seen the manner in which some of these changes are made. If something occurs to me which is generated by some addition that is made there, I trust you won't close the door on me.

THE COURT: Don't reopen things we talked about.

I will give this to you gentlemen and somebody please get it back retyped. Thank you very much.

MR. ZOLBERT: Your Honor, I might say we would like to make the same reservations Mr. Julien did. We haven't seen

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the changes. I presume we will have no problem with them.

THE COURT: I think you had better consider it pretty final. I don't want to hold the reporter here.

We will conclude this hearing. The only further thing is Mr. Julien's brief.

(Concluded at 6:10 p.m.)

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Supplemental Opinion of Judge Griesa on Damages and Attorneys' Fees, March 17, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

FLM COLLISION PARTS, INC.,

Plaintiff,

v.

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

- -X

73 Civ. 713

SUPPLEMENTAL OPINION

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GRIESA, J.

On December 19, 1975 I filed an opinion holding that plaintiff FLM Collision Parts, Inc. is entitled to injunctive relief and damages under Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Anti-discrimination Act, 15 U.S.C. § 13(a). I stated that a supplemental opinion would be issued on the amount of damages to be awarded following completion of the record on that subject.

The record is now complete. This supplemental opinion contains my findings of fact and conclusions of law as to the amount of damages, and also as to the amount of the attorneys' fee to be awarded pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15.

Damages

There are five items of damages claimed by FLM which require specific discussion. Certain other damage claims have been made by FLM based upon its theories of Sherman Act violation. Since these Sherman Act theories were rejected in my earlier opinion on

liability, I will not deal further with the related issues of damages.

Wholesale Incentive Allowances

FLM claims that it should recover the total amount of the wholesale incentive allowances which were denied by Ford commencing November 1, 1972.

Ford, in its Post-Trial Brief (pp. 92-96), basically conceded that, if there were liability, FLM would be entitled to recover the amount of these wholesale incentive allowances, provided that such amounts were accurately proved. In further proceedings, Ford has advanced two contentions. Ford argues that there is no showing that the entire amount of these wholesale incentive allowances would have been "passed on" by the Ford dealers to FLM. Ford also contends that the amount of the award for such allowances should be diminished by the alleged additional bookkeeping costs which FLM would have been required to incur in order to claim the wholesale incentive allowances.

FLM has accurately proved the amount of the wholesale incentive allowances which should have been

granted on Ford crash parts purchased by it during the relevant period. This period runs from November 1, 1972 to early 1976, when the final evidence was being introduced on the subject of damages. For the sake of convenience, a reasonable cutoff date for the damage period was selected -- February 6, 1976. I find that FLM has proved wholesale incentive allowances withheld in the total amount of $246,766.

I reject the contention that FLM has failed to show that the entire amount of these wholesale incentive allowances would have been passed on to FLM by the Ford dealers. Prior to the withdrawal by Ford of the wholesale incentive allowances on sales to FLM, these allowances were consistently passed on to FLM.[1] There is not the slightest reason to believe that this practice would not have continued had it not been for the action of Ford in halting the granting of the wholesale incentive allowances on crash parts sold to FLM.

I also find no merit in Ford's contention that the amount of the award for wholesale incentive allowances withheld should be diminished to take into account alleged additional bookkeeping costs. Ford points to

the allegation of FLM that about $46,000 was spent on accounting services rendered to FLM in the present litigation. Ford assumes quite reasonably that some portion of this $46,000 relates to the detailed review of invoices and other records necessary to reconstruct the amount of wholesale incentive allowances which should have been granted during the period November 1, 1972 to February 6, 1976, and argues that this indicates that there would have been additional bookkeeping expenses to calculate the wholesale incentive allowances even if allowance claims had been handled in the normal course of business.

Ford's argument is unrealistic. There is a great difference between calculating wholesale incentive allowances in the normal course of business and reconstructing this calculation for the purpose of litigation. There is no sufficient indication that FLM would have incurred any appreciable additional expense in order to process the wholesale incentive allowance claims in normal course.

For these reasons I find that FLM is entitled to damages in the amount of $246,766 representing wholesale incentive allowances which should have been granted.

Lost Sales

FLM claims that its sales were consistently growing at a rapid rate until the time that Ford denied the wholesale incentive allowance, and that its sales would have continued to grow at the same rate during the years following the cutoff of the wholesale incentive allowance. FLM contends that this growth was prevented by Ford's wrongdoing, and that damages should be awarded based upon the alleged loss of growth.

I have concluded that this claim, as presented by FLM, is entirely too speculative to justify an award of damages.

However, FLM is entitled to damages on a related, but somewhat different, theory. As described in my earlier opinion, FLM's sales grew steadily for several years from its commencement of business in 1965. During the fiscal year ending September 30, 1972 -- the last full fiscal year prior to the withdrawal of the wholesale incentive allowance -- FLM's sales were $736,967. The wholesale incentive allowance was cut off about November 1, 1972.

The economic effects of this cutoff were felt by FLM in stages. FLM was able to continue its growth in sales in fiscal 1973. The sales for that year were $798,947. However, the severe cut in FLM's profit margin produced a net loss of $85,707.

Prior to 1974 both FLM and the franchised Ford dealers with whom FLM competed in the sale of crash parts generally sold these parts to the independent repair shops at a 25% discount off the suggested retail price. Commencing in 1974 three of FLM's competitors -- Empire Ford in Mt. Vernon, Ruckle Ford in Yonkers, and W. H. Jackson Ford Sales in Ossining -- commenced granting substantially larger discounts than 25%. Since FLM, unlike its Ford dealer competitors, did not have the benefit of the wholesale incentive allowance, FLM could not afford to meet this price competition. FLM was also, by this time, experiencing a serious shortage of working capital. These conditions cut substantially into FLM's sales.

FLM's sales for fiscal 1974 were $695,188 -- down approximately $100,000 from the 1973 level. The basic adverse effect on FLM's sales volume continued after fiscal 1974, although sales in dollar terms rose above the 1974 level because of price inflation. Sales for fiscal 1975 were $722,681. Sales for the period October 1975 through February 6, 1976 were $301,803.

FLM has made a careful calculation, in dollar terms, of the net loss of sales commencing in fiscal 1974 and running to February 6, 1976 based upon a comparison with the level of 1973 sales. The total net loss of sales under this calculation is $169,456.[2] FLM has also made a calculation of the amount of net profit which FLM would have earned on the basis of this $169,456, assuming among other things that the wholesale incentive allowance would have been granted with respect to parts purchased. FLM's accounting methods in these calculations appear satisfactory, and are unchallenged by any convincing testimony or argument. Such net profit is $44,736, to which FLM is entitled as damages.

Increased Markup by Dealers

FLM claims that Ford's denial of the wholesale incentive allowance disrupted FLM's business relations with its then supplier of crash parts, Atlas Lincoln-Mercury. FLM claims that its subsequent suppliers have charged a 5% markup, instead of the 3% markup charged by Atlas. FLM claims the 2% differential as damages.

It is certainly true that Ford withdrew the wholesale incentive allowance on sales to FLM and that shortly thereafter FLM ceased doing business with Atlas, and commenced obtaining its supplies of crash parts from other Ford dealers. However, there is no sufficient showing that Ford's actions were the proximate cause of the termination of FLM's business dealings with Atlas. There is no indication that Ford prevented FLM and Atlas from negotiating to continue business after the withdrawal of the wholesale incentive allowance. Ford certainly did not prevent FLM from purchasing from other Ford dealers. As to the amount of markup charged by these other dealers, this was strictly a matter of negotiation between FLM and such dealers. Ford is not liable for this item of damages.

Obsolescence Credit

FLM claims that Atlas permitted FLM to obtain half of a 5% obsolescence credit allowed by Ford on crash parts. FLM claims that the subsequent suppliers have not permitted FLM to obtain any part of this credit, and that damages should be awarded for this alleged loss.

There is no evidence to indicate that Ford had anything to do with certain Ford dealers denying FLM the benefit of obsolescence credits. Ford is not liable for this item of damages.

Loss of Good Will

FLM contends that the "good will" value of its business has been destroyed, and seeks damages for this loss.

By good will, FLM refers to what a buyer would pay for the business as a going concern. FLM claims its business had a value of about $1 million prior to Ford's withdrawal of the wholesale incentive allowance. FLM contends that the value of its business has been entirely destroyed "since no purchaser will pay for

that business knowing that the defendants are seeking for a way to prevent the plaintiff from continuing in business" (Plaintiff's Post-Trial Brief p. 69). This theory of damages is inappropriate in the present case. The wrongdoing of Ford will be the subject of injunctive relief. Plaintiff's expert witness admitted that the possibility of injunctive relief would affect his opinion regarding the destruction of FLM's good will value. He further admitted that he had not taken such possibility into account in making his calculation. I conclude that FLM is not entitled to this item of damages.

Summary Regarding Damages

FLM has proved damages in the amount of $246,766 representing wholesale incentive allowances withheld on parts purchased commencing November 1, 1972. FLM has proved damages in the amount of $44,736, representing the net profit FLM would have earned on sales lost due to the wrongful acts of Ford. The total of these two amounts is $291,502. FLM is entitled to recover treble this amount, or $874,506.

Attorneys' Fees

FLM's attorneys -- David L. Wasser, Esq. and the firm of Julien & Schlesinger -- apply for an award of attorneys' fees in the total amount of $425,000. Application is also made for payment to Mr. Wasser of an additional $36,500 to cover accounting services rendered by him. In addition, payment of $10,350 is sought for two other accountants -- Morris Israel and Jack Brand. Finally, FLM seeks to have costs of the action taxed in the amount of $1300.90.

When the controversy between FLM and Ford originally arose, FLM was represented by Wasser, who was both the accountant and attorney for FLM. Commencing in the fall of 1972, Wasser complained to Ford about its conduct, had discussions with representatives of the Federal Trade Commission, and prepared the complaint in this action, which was filed in February 1973. Wasser presented a motion for preliminary injunction against Ford which was withdrawn in March 1974.

In July 1974 the firm of Julien & Schlesinger was brought into the case. Thereafter, Wasser and Julien & Schlesinger worked together on discovery and the trial of the case.

The case involved a relatively small amount of discovery followed by a seven-day trial in late September and early October 1974. There was extensive briefing on the difficult legal issues in the case before, during and after the trial. Following the original opinion of the court on liability, filed December 19, 1975, there were further hearings on damages Frebruary 9 and March 2, 1976.

The method to be used in calculating attorneys' fees is to start with the amount of time the attorneys have expended on the case, and to value that time by applying the hourly rate which attorneys of like skill in the area would typically be entitled to. After this calculation is made, adjustment should be made for such factors as the magnitude and complexity of the litigation, the amount recovered and litigation risks. City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974).

Wasser states that he spent 1277 hours on legal work, as distinct from accounting work. Wasser uses a rate of $100 per hour, producing a total dollar figure of $127,700. The firm of Julien & Schlesinger represents that the time spent and appropriate billing rates were as follows:

Alfred S. Julien -- senior partner --

197 hours -- $200 per hour -- total $39,400

Stuart A. Schlesinger -- junior partner --

268 hours -- $125 per hour -- total $33,500

David Jaroslawicz -- senior associate --

362 hours -- $65 per hour -- total $23,530.

The total of this time for Julien & Schlesinger is 827 hours, and the total dollar amount is $96,430.

The total time claimed to have been spent by Wasser and Julien & Schlesinger on legal work for the case is 2104 hours, and the total of the dollar amounts shown above for all the lawyers is $224,130.

There are several difficulties with these calculations. In the first place, neither Wasser nor any of the attorneys at Julien & Schlesinger maintained time records. It is nothing short of amazing that this

should be so, in view of the warnings issued by our Court of Appeals in analogous cases. In re Borgenricht, 470 F.2d 283, 284 (2d Cir. 1972); In re Hudson & Manhattan R.R., 339 F.2d 114, 115 (2d Cir. 1964). Also, the decision in City of Detroit v. Grinnell Corp., supra, which emphasized the importance of the attorneys' time calculations in connection with antitrust fee applications, was handed down on March 13, 1974. This was four months before Julien & Schlesinger were retained in the present case.

Another problem is that, under the applicable law, no award of attorneys' fees can be made under Section 4 of the Clayton Act except for services related to the successful recovery of treble damages under that section. In other words, no award can be made under the statute for work devoted exclusively to the pursuit of injunctive relief or of unsuccessful theories of liability. Decorative Stone Co. V. Bldg. Trades Council, 23 F.2d 426 (2d Cir.), cert. denied, 277 U.S. 594 (1928); Trans World Airlines, Inc. v. Hughes, 312 F. Supp. 478, 482-83 (S.D.N.Y. 1970), aff'd, 449 F.2d 51 (2d Cir. 1971), rev'd on other grounds, 409 U.S. 363 (1973).

Applying this rule to the present case, it is clear that the time spent by Wasser in complaining to Ford, in having discussions with the Federal Trade Commission and in presenting the motion for preliminary injunction cannot be the basis for recovery of a fee award. Moreover, time spent by either Wasser or Julien & Schlesinger in pursuing the unsuccessful Sherman Act claims and in drafting the permanent injunction cannot be the basis for a fee award. I am now speaking of efforts devoted solely to these activities -- activities which did not also relate to the successful Robinson-Patman Act damage claims. To the extent that work was carried out which bore upon both the Robinson-Patman Act damage claims and upon requests for injunctive relief and other theories of recovery, there can be an award of attorneys' fees under the statute. Trans World Airlines, Inc. v. Hughes, 312 F. Supp. at 483.

Another problem is that, to the extent that there was duplication of effort as between Wasser and Julien & Schlesinger, the fee award must be reduced. Michelman v. Clark-Schwebel Fiber Glass Corp., 1975-2 Trade Cas. ¶60,551 (S.D.N.Y. 1975).

The task of sorting out what time related to recoverable items and what time related to non-recoverable items is obviously made more difficult than it should be because of the failure of the attorneys to keep time records. However, there is no alternative but to make reasonable estimates on the basis of available information.

I am compelled to disallow most of the time claimed to have been spent by Wasser on legal services.

Wasser asserts that he spent 280 hours through the time the complaint was filed. He conferred with his client, with Ford's counsel and with the Federal Trade Commission. He performed legal research and drafted the complaint. It is clear that out of this 280 hours the only recoverable time is that which was spent on factual investigation and legal research leading up to the commencement of this action, and also time spent on drafting the complaint. I will allow only 100 out of the 280 hours.

Wasser asserts that he spent 335 hours in connection with the application for preliminary injunction. There is no basis for allowing any of this time.

Wasser claims that 409 hours were spent on "Discovery and Trial Preparation." I conclude that almost all of this time was a duplication of work done by Julien & Schlesinger. The one item which was not duplicative was Wasser's preparation of interrogatories prior to the retention of Julien & Schlesinger. I will allow 75 out of the 409 hours.

Wasser claims a total of 253 hours for time spent at the trial and in post-trial activities. I conclude that the great bulk of this time was either a duplication of the work of Julien & Schlesinger or was work in Wasser's capacity as an accountant and expert witness. The cost of these services is not recoverable as attorneys' fees or costs under Section 4 of the Clayton Act. Trans World Airlines, Inc. v. Hughes, 449 F.2d 51, 81 (2d Cir. 1971), rev'd on other grounds, 409 U.S. 363; Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 224 (9th Cir.), cert. denied, 379 U.S. 880 (1964). I will allow only 50 out of the 253 hours.

The total amount of time allowed for Wasser is 225 hours. As to Wasser's hourly rate, I find no reason to challenge his figure of $100. Applying this rate to the 225 hours, gives a total of $22,500.

As to the time spent by Julien & Schlesinger, the estimate of 827 hours for the three lawyers involved is not unreasonable, although it would have been far more satisfactory to have actual time records. The problem comes in attempting to calculate the time spent on compensable items versus the time spent on non-compensable items. The principal items in the latter category would relate to the unsuccessful Sherman Act claims. On this point I am concerned primarily with legal research and legal briefing, since the preparation and presentation of evidence in the case related both to the Sherman Act claims and to the successful Robinson-Patman Act damage claims. I am excluding 20 hours for Julien, 40 hours for Schlesinger, and 80 hours for Jaroslawicz in connection with briefing of Sherman Act claims. A certain amount of time must also be

excluded for work on the final injunction. In this regard, I am deducting 2 hours for Julien and 5 hours for Schlesinger. This gives net totals for the three attorneys from Julien & Schlesinger as follows:

Julien.....175 hours

Schlesinger.....223 hours

Jaroslawicz.....282 hours

With respect to the hourly rate to be applied, Julien & Schlesinger reported to the Court that the rates for the three attorneys respectively, charged in matters billed by the hour, were $200, $125, and $65. I find that the appropriate hourly rates are $135, $100, and $65.

Applying these rates to the number of hours spent by the attorneys at Julien & Schlesinger gives a total amount of $64,255. Adding this to the $22,500 for Wasser gives a total of $86,755.

A fee somewhat above this amount is appropriate. The litigation was attended with numerous difficulties and risks. There was no assistance from any prior governmental proceeding. See City of Detroit v. Grinnel Corp., 495 F.2d 448, 470-71 (2d Cir. 1974).

Under all the circumstances, I am awarding attorneys' fees in the amount of $135,000.

The application for fees for accounting work of Israel and Brand is denied. Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 224 (9th Cir.), cert. denied, 379 U.S. 880 (1964); see Trans World Airlines, Inc. v. Hughes, 449 F.2d 51, 81 (2d Cir. 1971), rev'd on other grounds, 409 U.S. 363; Strauss v. Victor Talking Machine Co., 297 F. 791 (2d Cir. 1924).

Costs will be taxed by the Clerk of the Court in the normal manner.

Conclusion

FLM is entitled to judgment in the amount of $874,506 plus attorneys' fees in the amount of $135,000, together with costs to be taxed by the Clerk of the Court.

A judgment and final injunction will be signed and filed today.

Dated: New York, New York
March 17, 1976

Thomas P. Griesa

THOMAS P. GRIESA
U.S.D.J.

FOOTNOTES

1. It is true, of course, that the Ford dealer supplying FLM with parts charged a markup of 3% during the time the wholesale incentive allowance was in effect for sales to FLM. The application of this 3% markup is described in my earlier opinion. However, there would be no justification for deducting the 3% markup from the damage award. FLM has already paid a markup to its supplying Ford dealers on the parts on which the damage award is calculated. Indeed the markup has been 5%.

2. This takes into account that, in dollar terms, the sales for the period October 1975 through February 6, 1976 ($301,803) were actually greater than pro rated sales at the 1973 level for the same period ($274,758). Ford is given credit for this in the overall calculation despite the fact that the increased dollar volume was due to price inflation.

THOMAS P. GRIESA
U.S.D.J.

Judgment of Judge Griesa, March 17, 1976

ENTERED

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

73 Civ. 713 (TPG)

- x

This action having come on for trial before this Court, the Honorable Thomas P. Griesa, United States District Judge, presiding, on September 23, 24, 25, 30 and October 7, 8 and 9, 1974 and the issues having been duly tried, and a decision on liability having been duly rendered in an opinion dated December 19, 1975, and the said opinion constituting the Court's findings of fact and conclusions of law on the liability phase of the case and this Court having conducted furtner hearings on February 9 and March 2, 1976, at which evidence was received on plaintiff's claim for damages, and this Court having jurisdiction of this action based upon Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26; and defendant Ford Marketing Corporation having been merged into defendant Ford Motor Company as of the close of business on December 31, 1974, it is hereby:

Order and Judgment

1. ORDERED, ADJUDGED AND DECREED that the plaintiff has failed to make out any claim for relief under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2 and plaintiff's claims thereunder are hereby dismissed;

Exhibit A

2. ORDERED, ADJUDGED AND DECREED that the plaintiff has proved its cause of action against defendant Ford Marketing Corporation (now merged into Ford Motor Company) for violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. §13(c), and the plaintiff having proved damages in the amount of $291,502.33, the plaintiff is entitled to recover treble that amount against defendant Ford Motor Company pursuant to 15 U.S.C. §15 and in accordance with said provision the plaintiff is hereby awarded judgment therefor against the defendant Ford Motor Company in the amount of $874,506.00, together with attorneys' fees to be paid by defendant Ford Motor Company in the amount of $135,000.00 and costs to be taxed by the Clerk of the Court against said defendant.

TPJ

TPJ

TPJ

Injunction

The defendant Ford Marketing Corporation having been found to have discriminated in prices between franchised dealers in the sale of crash parts in violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. §13(c), and the plaintiff being entitled to injunctive relief therefor pursuant to 15 U.S.C. §26 to prevent any such further violation of said Section in the future, it is hereby

ORDERED AND DECREED that defendant Ford Motor Company commencing on April 1, 1976 shall grant the wholesale incentive allowance to franchised dealers on the resale of crash parts by such dealers to FLM Collision Parts, Inc., on the same terms and conditions as such

Exhibit A

wholesale incentive allowance is granted to such dealers on the resale of crash parts to any other "eligible customers" as that term is defined and used in Ford's Master Price List and Ford's Policy & Procedure Manual; and it is

FURTHER ORDERED AND DECREED that defendant Ford Motor Company no later than April 1, 1976 distribute by first class mail to each of its franchised Ford and Lincoln-Mercury dealers located in the New York metropolitan area served by defendant's Master Parts Depot located in Teterboro, New Jersey, in the form annexed hereto as Exhibit A, a statement informing such dealers that defendant Ford Motor Company will grant the wholesale incentive allowance to such dealers on the resale of crash parts by such dealers to FLM Collision Parts, Inc. on the same terms and conditions as such wholesale incentive allowance is granted to such dealers on the resale of crash parts to any other "eligible customers" as that term is defined and used in Ford's Master Price List and Ford's Policy and Procedure Manual.

Retention of Jurisdiction

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this order, judgment and injunction, for the modification of any of the provisions thereof, for the enforcement of compliance therewith, and for punishment of any violations thereof.

Dated: New York, New York
March 17, 1976

Thomas P. Griesa

THOMAS P. GRIESA
United States District Judge

Exhibit A

Date

(Name of Dealer to Be Supplied)

Gentlemen:

In a proceeding brought by FLM Collision Parts, Inc. against Ford Motor Company in the United States District Court for the Southern District of New York (73 Civ. 713), United States District Judge Thomas P. Griesa on December 19, 1975 found that Ford's failure to grant wholesale incentive on resales by its franchised dealers of crash parts to FLM Collision Parts, Inc. was price discrimination in violation of Section 2(a) of the Robinson-Patman Act.

Accordingly, please be advised that as of , the Court issued an injunction directing Ford to grant the wholesale incentive allowance to franchised dealers on the resale of crash parts by such dealers to FLM Collision Parts, Inc. on the same terms and conditions as such wholesale incentive allowance is granted to such dealers on the resale of crash parts to any other "eligible customers" as that term is defined and used in Ford's Master Price List and Ford's Policy and Procedure Manual.

This is to advise you that any crash parts resold by you to FLM Collision Parts, Inc. on and after April 1, 1976 are eligible for the wholesale incentive allowance and Ford will pay such an allowance to you in accordance with the terms of the Policy and Procedure Manual.

Very truly yours,

FORD MOTOR COMPANY

§8 POST-JUDGMENT DEVELOPMENTS

Defendants' Notice of Appeal, March 19, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FLM COLLISION PARTS, INC., Plaintiffs,	:	73 Civ. 713 (TPG)
-against-	:	NOTICE OF APPEAL
FORD MOTOR COMPANY and FORD MARKETING CORPORATION, Defendants.	:	

Notice is hereby given that Ford Motor Company and Ford Marketing Corporation, defendants above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the final order, judgment and injunction entered in this action on the 17th day of March, 1976.

Dated: March 19, 1976
New York, New York

SULLIVAN & CROMWELL

By Robert MacCrate
Robert MacCrate

Attorneys for Defendants
48 Wall Street
New York, New York 10005
(212) 952-8100

TO:

Clerk of the United States
District Court
For the Southern District of
New York

Julien & Schlesinger, P.C.
2 Lafayette Street
New York, New York 10007

Order to Show Cause, March 19, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FLM COLLISION PARTS, INC.	:	
Plaintiff,	:	73 Civ. 713 (TPG)
-against-	:	
FORD MOTOR COMPANY and FORD MARKETING CORPORATION,	:	ORDER TO SHOW CAUSE
Defendants.	:	

Upon the order, judgment and injunction entered in this action on March 17, 1976, upon defendants' notice of appeal therefrom filed on March 19, 1976, upon all the prior proceedings in this action, and upon the affidavit of Robert MacCrate sworn to March 19, 1976; and sufficient cause appearing therefor, it is hereby

ORDERED that plaintiff FLM Collision Parts, Inc. show cause before this Court in Room 506 of the United States Courthouse, Foley Square, New York, New York, at 11:30 A.M. on March 22, 1976, or as soon thereafter as counsel can be heard, why an order staying injunctive relief pending appeal should not be entered pursuant to Rule 62(a) and (c) of the Federal Rules of Civil Procedure and granting such other and further relief as to the Court appears just and proper; and it is further

ORDERED, that service of a copy of this Order to Show Cause and the annexed affidavit be made on plaintiff's

attorneys on or before 11:00 A.M. on the 19th day of March, 1976.

Dated: New York, New York
March __, 1976

U.S.D.J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- -x

FLM COLLISION PARTS, INC. :

Plaintiff, : 73 Civ. 713 (TPG)

-against- :

FORD MOTOR COMPANY and FORD MARKETING CORPORATION, : AFFIDAVIT

:

Defendants. :

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT MacCRATE, being duly sworn, states:

1. This affidavit is submitted in support of an order to show cause bringing on defendant's motion to stay pending appeal the injunction issued in this action on March 17, 1976.

2. The injunction requires defendant Ford Motor Company commencing on April 1, 1976 to grant the wholesale incentive allowance to franchised dealers on the resale of crash parts by such dealers to FLM Collision Parts, Inc., on the same terms and conditions as such wholesale incentive allowance is granted to such dealers on the resale of crash parts to any other "eligible customers" as that term is defined and used in Ford's Master Price List and Ford's Policy & Procedure Manual. In addition, the injunction requires Ford Motor Company to notify franchised dealers in the New York Metropolitan area no later than April 1, 1976 in a form of letter which is attached to the order,

judgment and injuction dated March 17, 1976.

3. On March 19, 1976 defendants are filing a notice of appeal to the United States Court of Appeals for the Second Circuit from all parts of the order, judgment and injunction entered in this action on March 17, 1976. By their present motion, defendants seek a stay of this injuction pursuant to Rule 62(a) and (c).

4. Defendants regard their appeal as meritorious, believe there to be a reasonable likelihood of success on appeal and intend to prosecute the appeal promptly. We submit that, for the reasons set forth in the memorandum in support of the motion for a stay, the interests of Ford could be seriously prejudiced were the stay not to be granted. At the same time, we submit that no possible prejudice to the plaintiff would be involved. Plaintiff would be fully protected by security approved by the Court; but were the stay not to be granted and the appeal successful, Ford could find itself irreparably injured in its relationship with its dealers were it to seek to restore the status quo. A stay pending appeal would assure protection of the interests of Ford, but it would also protect the interests of the non-party franchised dealers and indeed of the plaintiff who would be able to deal with franchised dealers freed from concern as to the possible outcome of the appeal.

5. No previous application for the stay requested in this application has been made.

Robert MacCrate

Sworn to before me this
18th day of March, 1976.

[illegible]
Notary Public
New York County
Commission Expires [illegible]

Order to Show Cause, March 19, 1976

73 CIVIL ACTION NO. 713 (TPG)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
NEW YORK

FLM COLLISION PARTS, INC.,

Plaintiffs,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

ORDER TO SHOW CAUSE
AND AFFIDAVIT

SULLIVAN & CROMWELL
48 WALL STREET, NEW YORK, N. Y. 10005
(212) 952-8100

ATTORNEYS FOR
Defendants
Ford Motor Company and Ford
Marketing Corporation

2053A

Memorandum of Defendant Ford Motor Company in Support of Motion For Stay of Injunction Pending Appeal, March 19, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FLM COLLISION PARTS, INC.,	:	
Plaintiffs,	:	73 Civ. 713 (TPG)
-against-	:	
FORD MOTOR COMPANY and FORD MARKETING CORPORATION,	:	
Defendants.	:	

MEMORANDUM IN SUPPORT OF DEFENDANT FORD MOTOR COMPANY'S MOTION FOR STAY OF ORDER, JUDGMENT AND INJUNCTION

SULLIVAN & CROMWELL,
Attorneys for Defendants
Ford Motor Company and
Ford Marketing Corporation
48 Wall Street
New York, New York 10005

Robert MacCrate
William M. Dallas, Jr.

William A. Zolbert
Office of the General Counsel,
Ford Motor Company

Of Counsel.

March 19, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FLM COLLISION PARTS, INC., Plaintiffs,	:	73 Civ. 713 (TPG)
-against-	:	
FORD MOTOR COMPANY and FORD MARKETING CORPORATION, Defendants.	:	

MEMORANDUM IN SUPPORT OF DEFENDANT FORD MOTOR COMPANY'S MOTION FOR STAY OF ORDER, JUDGMENT AND INJUNCTION

On September 23, 24, 25 and 30, 1974 and October 7, 8 and 9, 1974 trial was held before this Court in this action. On December 19, 1975 this Court entered an opinion on the liability phase of the case finding defendant Ford Motor Company ("Ford") to have engaged in price discrimination in violation of Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), in the sale of crash parts to Ford's franchised dealers by not granting the wholesale incentive allowance on the resale of crash parts by the franchised dealers to plaintiff FLM Collision Parts, Inc. ("FLM"). The Court found FLM was entitled to treble damages pursuant to 15 U.S.C. § 15 and injunctive relief pursuant to 15 U.S.C. § 26.

Further hearings were held by the Court on the issue of damages on February 9 and March 2, 1976. Subsequently, on March 17 the Court issued an Order, Judgment and Injunction awarding FLM treble damages of $874,506 and ordering Ford to grant the wholesale incentive allowance on resales of crash parts by its dealers to FLM under the same terms and conditions as the wholesale incentive allowance is granted on resales of crash parts by such dealers to any other "eligible customers" as that term is defined and used in Ford's Master Price List and Ford's Policy and Procedure Manual.

Ford now seeks, pursuant to Rules 62(a), (c) and (d) of the Federal Rules of Civil Procedure a stay of the execution and enforcement of that Order, Judgment and Injunction.*

On March 19, Ford filed its Notice of Appeal from the Court's Order entered on March 17. Rule 62(c) of the Federal Rules of Civil Procedure provides in relevant part:

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* As Ford has filed a Notice of Appeal pursuant to Rules 3 and 4 of the Rules of Appellate Procedure and posted bonds, pursuant to Rule 62(d) of the Federal Rules of Civil Procedure and Rule 7 of the Rules of Appellate Procedure the execution of the judgment awarding treble damages of $874,506 along with attorneys' fees of $135,000 and costs to be taxed by the Clerk of the Court is automatically stayed pursuant to Rules 62(a) and (d) of the Federal Rules of Civil Procedure. The discussion in this memorandum is, therefore, limited to the stay of the injunction.

> "(c) Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party . . . "*

We submit that the practicalities of the business relationships involved in this case, demonstrate the appropriateness of a stay of the injunction pending appeal.

As the Court found, Ford does not do business with FLM either directly or indirectly.** Rather Ford sells crash parts only to its franchised dealers, several of whom, in turn, resell to FLM. Similarly, the wholesale incentive allowance is granted to Ford's dealers, not the dealers' customers, in this case FLM. As the Court found, whether or not the dealers pass all or part of the incentive on to FLM is solely a matter of negotiation between such dealers and FLM. The same distribution relationship will obtain in the future and Ford will continue to have no control over whether any wholesale incentive is passed on to FLM.

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* Ford hereby offers to post a bond of $200,000, an amount well in excess of the wholesale incentive allowance reasonably to be expected to be earned on the sale of crash parts by Ford's franchised dealers to FLM during the pendency of the appeal.

** In fact, the Court further found Ford's refusal to deal with FLM was entirely lawful. (Slip Opinion, p. 64)

In these circumstances, were Ford to pay wholesale incentive to its franchised dealers on sales to FLM while an appeal is pending, the question arises of what will happen if this Court's decision is reversed on appeal -- if an appellate court rules that Ford does not have to grant the wholesale incentive allowance on sales of crash parts by its dealers to FLM? How will Ford get its money back? From FLM? The dealers selling to FLM may or may not pass on dollar for dollar the wholesale incentive allowance to FLM and in any event, Ford will not have dealt with FLM but only with the dealers. From the dealers selling to FLM? The dealers are not parties to this action and not before the Court. There would appear to be no basis on which the Court could order such dealers to return the wholesale incentive allowance.*

In such circumstances, the only solution would be for Ford to tell its dealers in advance that, while it would pay the wholesale incentive allowance to dealers on sales of crash parts to FLM, if the Court's decision were reversed on appeal, the dealers would be subject to a charge back in an amount equal to those incentive

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* In fact, the Court specifically found that there was no contract, combination or conspiracy between Ford and its dealers.

payments, plus interest. While the dealers could then pass the incentive on to FLM with the understanding that it would be returned if the dealers were later charged back, it is doubtful that any dealer would be willing to pay over such amounts under such circumstances. Since it is unlikely that FLM would receive the benefit of any wholesale incentive allowance pending appeal, what possible purpose would be served in requiring Ford to pay these amounts to its franchised dealers?

We submit that the more practical approach is for Ford to post a bond to secure payment of the wholesale incentive allowance to the dealers selling to FLM in the event the Court's order is upheld on appeal. During the pendency of the appeal FLM and its supplying dealers would be free to negotiate whatever arrangements they wished to make concerning the possible sharing of the wholesale incentive allowance if the Court's order is upheld.* At the same time, Ford's interests and right to be protected against the possibility that it would not be able to recapture the wholesale incentive

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* Ford is willing to notify its dealers in the New York metropolitan area served by the Master Parts Depot located in Teterboro, New Jersey, of the status of this litigation, including the fact that the wholesale incentive will be paid on sales by dealers of crash parts to FLM if the Court's Order is upheld on appeal. (A draft of such a letter is attached hereto as Exhibit A.)

would be assured. In short, all parties to this action, as well as Ford's non-party dealers, would be insured against future damage dependent upon the results of Ford's appeal.

The criteria to be used in determining whether a stay should be issued are generally the same as those used in ruling on a motion for a preliminary injunction. In Belchor v. Birmingham Trust National Bank, 395 F.2d 685 (5th Cir. 1968) citing Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir. 1958), the Court held that the standards to be considered are: (1) movant's likelihood of success on the merits, (2) irreparable injury to movant, (3) lack of harm to other parties to the litigation, and (4) whether there is any harm to the public interest.*

While the Court may not believe that Ford is likely to be successful on appeal, the Court has previously observed that a finding of liability on similar facts in this case had not heretofore been made in any prior action.

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* While there is some validity in burdening one seeking to stay a prohibitory injunction (i.e., one seeking to change the status quo) with the criteria required to obtain a preliminary injunction, we submit that it is not correct for one seeking to stay a mandatory injunction (i.e., one seeking to preserve the status quo) to shoulder that same burden.

(Post-Trial Conference, January 16, 1975). The novelty of this issue is also stressed by plaintiff (See Fee Petition, p. 5). In addition, the case most closely parallel to the instant action resulted in a ruling contrary to the Court's holding here. See Klein v. Lionel, 237 F.2d. 13 (3d Cir. 1956). This element of novelty has been recognized as a factor to be considered in deciding whether to stay an injunction during the pendency of an appeal. See, e.g., Rodriquez v. San Antonio Independent School District, 337 F. Supp. 280 (W.D. Tex. 1972); see also 7 Moore's Federal Practice ¶ 62.05 at 62-25, fn. 15c (2d ed. 1974).

The element of irreparable injury, of course, has been previously dealt with in this memorandum. It is clear that it would be virtually impossible to return to the status quo ante once Ford began to make payments to dealers reflecting the wholesale incentive allowance on sales by such dealers of crash parts to FLM. Where, as here, irreparable damage to Ford or its non-party dealers could result and restoration of the status quo ante would be unlikely in the event the Court's order is reversed, a stay of injunctive relief pending appeal should be granted. 7 Moore's Federal Practice, supra, at 62-24.

FLM, on the other hand, would be fully protected from harm. It would have insurance against any injury by

Ford's posting of a bond and Ford's proposal to issue notice to its New York Metropolitan Area dealers informing them of the status of this litigation.

Finally, there would be no harm to the public interest were the Court to stay the injunction. Since this is a private non-class action brought by and on behalf of FLM and the Court's order is directed only in favor of FLM, there is no substantial public interest involved in the temporary suspension of the Court's injunction pending appeal. Should the Court's decision be affirmed on appeal, whatever public interest is entailed in this litigation would be satisfied fully by the prompt payment to franchised dealers of the wholesale incentive allowance for resales of crash parts to FLM made during the pendency of appeal.

CONCLUSION

Defendant Ford Motor Company respectfully submits, therefore, that based both on the peculiar circumstances of this case and on the law, the interests of the parties, as well as the non-party Ford franchised dealers, will best be served by the issuance of a stay of the Court's Order, Judgment and Injunction during the pendency of the appeal.

Dated: March 19, 1976
New York, New York

Respectfully submitted,

SULLIVAN & CROMWELL,
Attorneys for Defendants
Ford Motor Company and
Ford Marketing Corporation
48 Wall Street
New York, New York 10005

Robert MacCrate
William M. Dallas, Jr.

William A. Zolbert

Office of the General Counsel,
Ford Motor Company

Of Counsel

[Ford Motor Company Letterhead] EXHIBIT A

Date

(Name of Dealer to be Supplied)

Gentlemen:

In a proceeding brought by FLM Collision Parts, Inc. against Ford Motor Company in the United States District Court for the Southern District of New York (73 Civ. 713), United States District Judge Thomas P. Griesa on December 19, 1975 found that Ford's failure to grant wholesale incentive on resales by its franchised dealers of crash parts to FLM Collision Parts, Inc. was price discrimination in violation of Section 2(a) of the Robinson-Patman Act.

On March 17, 1976 the Court entered a judgment against Ford which included an injunction directing Ford to grant the wholesale incentive allowance to franchised dealers on the resale of crash parts by such dealers to FLM Collision Parts, Inc. on the same terms and conditions as such wholesale incentive allowance is granted to such dealers on the resale of crash parts to any other "eligible customers" as that term is defined and used in Ford's Master Price List and Ford's Policy and Procedure

Manual. The Court, however, stayed the effectiveness of this injunction during the pendency of Ford's appeal of the judgment.

This is to advise you that, in the event the judgment is upheld on appeal, any crash parts resold by you to FLM Collision Parts, Inc. on or after April 1, 1976 will be eligible for the wholesale incentive allowance and Ford will then pay such an allowance to you for resales made during the pendency of appeal in accordance with the terms of the Policy and Procedure Manual.

Very truly yours,

FORD MOTOR COMPANY

Plaintiff's Memorandum in Opposition to Motion For Stay of Injunction Pending Appeal, March 22, 1976

2066a

ENTERED

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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FILM COLLISION PARTS, INC.,

Plaintiff,

-against- 73 Civ. 713 (TPC)

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

----------x

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE DEFENDANT FORD MOTOR COMPANY'S MOTION FOR A STAY OF THE INJUNCTION PENDING APPEAL

JULIEN & SCHLESINGER, P. C.
2 LAFAYETTE STREET
NEW YORK, N. Y. 10007
(212) 962-8020

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

73 Civ. 713 (TPG)

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

----------x

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE DEFENDANT FORD MOTOR COMPANY'S MOTION FOR A STAY OF THE INJUNCTION PENDING APPEAL

Statement of Facts

After a seven-day trial during the fall of 1974, the Court found that the defendant Ford had violated Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) with regard to sales of Ford crash parts. Subsequently, in February and March 1976, further hearings on damages were held. On March 17, 1976, this Court awarded the

plaintiff a judgment for damages and pursuant to 15 U.S.C. § 26, enjoined the defendant Ford from any future violation of the Robinson-Patman Act.

Ford has filed a notice of appeal from this Court's order and has now moved by order to show cause for an order pursuant to Rule 62(c) of the Federal Rules of Civil Procedure staying the injunction granted by this Court pending appeal.

POINT 1

THE DEFENDANT IS NOT ENTITLED TO A STAY OF THE INJUNCTION PENDING APPEAL

Ford seeks an order staying the injunction pending appeal on the grounds that it will likely be successful on appeal, it will be irreparably harmed in the absence of such a stay, and that there will be no harm to the plaintiff if such a stay is granted. As will be shown the facts are directly to the contrary. There will be no irreparable harm to Ford if a stay of the injunction is not granted and, on the other hand, if a stay of the injunction is granted, the plaintiff's business will be destroyed.

Ford admits that the criteria to be used in determining whether a stay of an injunction should be issued are those set forth in Virginia Petroleum Job. Assn. v. Federal Power Com'n, 259 F. 2d 921, 925 (D.C. Cir. 1958). These criteria have been accepted by the Second Circuit in Eastern Airlines Inc. v. Civil Aeronautics Board, 261 F. 2d 830 (Second Cir. 1958), the criteria being as follows:

> 1. The party moving for a stay must show that it is likely to prevail on the merits of the appeal;
>
> 2. The moving party must demonstrate that it will be irreparably injured if such a stay is not granted;
>
> 3. What effect would the issuance of such a stay have on the other party to the litigation; and
>
> 4. Where does the public interest lie.

A review of these criteria indicates that Ford is not entitled to a stay of the injunction pending appeal. Ford has not made a strong showing that it is likely to prevail on the merits of the appeal. Ford has simply

stated in conclusory language that the issues before the Court were novel in their fact pattern in that there was no prior case directly in point. This has very little weight to it in a situation such as ours were there has been extensive analysis by the Court of the law, and the Court has reached a conclusion that a defendant has violated the antitrust laws. Ford has failed to cite any authority showing error on the part of the Court. The Court should also take cognizance of the fact that we are not here dealing with a preliminary injunction before all the facts have been heard, but rather that the Court has reached this decision after a full trial on the merits and found that the plaintiff is entitled to an injunction. As Moore has stated in his work on Federal Practice ¶62.05

> ". . . it is to be recognized that in most instances a preliminary injunction is considered at a hearing taking place before a full trial has been held, while the permanent injunction was granted after plenary trial. Thus when the judge has held a full trial and granted the injunction, it is perhaps unusual that he would come to the conclusion that the appellant is likely to prevail on the appeal."

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Ford, who has the affirmative burden of showing a likelihood of success on the merits, has clearly failed to do so.

The second criteria which Ford, as the petitioner for a stay of the injunction, has the burden of proving to the Court, is that Ford will be irreparably injured if a stay of the injunction is not granted. In an attempt to show such irreparable injury to the Court, Ford claims that its relationship with its dealers would be interfered with and that if this Court's decision is reversed on appeal, there would be no guarantee that Ford would be able to recover all of the wholesale incentive allowance which it paid its dealers on sales of crash parts to FLM. Put simply, Ford contends that it may suffer some monetary loss if a stay of the injunction is not granted.

All of the cases which have considered this matter have held that monetary loss is not the kind of irreparable injury which warrants the stay of an injunction. In the very case relied upon by Ford, Virginia Petroleum,

the Court considered this question and stated in language directly applicable to this case:

> "The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." (259 F. 2d 921)

For the same proposition, see also Long v. Robinson, 432 F. 2d 977, 980 (Fourth Cir. 1970).

Ford's contention that it will be irreparably harmed because it may not be able to recover the wholesale incentive paid to Ford's franchise dealers if this Court's decision is overturned on appeal is not the type or irreparable harm which warrants the stay of an injunction.

Similarly, Ford's contention that its relationship with its dealers might be interfered with if a stay of the injunction is not granted is not the type of irreparable harm which entitles it to the stay of an injunction. The Supreme Court in Twentieth Century Airline v. Ryan, 74 S. Ct. 8 (1953) considered a similar contention and stated:

> "the private financial arrangements of applicants may be affected, public and employee relations damaged, but such threatened injury does not show the irreparably injury that might justify judicial intervention to stop the Board hearings until there is a judicial determination of the validity of the Board Regulations." (74 S. Ct. at 11)

There will be no irreparable harm to Ford except for a slight possible monetary loss if the stay of the injunction is not granted and Ford is successful on appeal, which seems doubtful in light of this Court's carefully considered opinion.

In addition, a slight monetary loss of which Ford admits would not possibly exceed $200,000, to a firm with Ford's assets which number in the billions of dollars, could hardly be deemed to be irreparable harm.

The issuance of a stay of this Court's injunction would irreparably injure FLM in that it would drive FLM out of business in the intervening period while this matter was being appealed. FLM would then be in the unenviable position of having won the battle but lost the war, in that after this Court had found that Ford had violated

the Robinson-Patman Act, FLI would be placed in the position that it could not receive the wholesale incentive discount during the period that this matter was being appealed, and would be driven out of business. There was more than sufficient testimony before the Court at a trial of this action to indicate the nature and extent of the harm that FLI has suffered by reason of Ford's violation of the antitrust laws and that FLI could not survive such a continued violation for any reasonable period of time in the future.

The Court in Virginia Petroleum in considering this criteria stated in language directly applicable to this case:

> "On this side of the coin, we must determine whether, despite showings of probable success and irreparable injury on the part of petitioner, the issuance of a stay would have serious adverse effect on other interested persons. Relief saving one claimant from irreparable injury, at the expense of similar harm caused another, might not qualify as the equitable judgment that a stay represents." (259 F. 2d 921, 925)

Ford's contention and suggestion that by posting a bond of $200,000 to cover any wholesale incentive allowances

which FLM might have been entitled to if the injunction were in effect is frivolous. FLM at this point is fighting for its life to survive. There has been more than sufficient testimony as was recognized by this Court in its supplementary opinion (p. 7) that FLM's competitors are granting large discounts on Ford crash parts. If FLM is not permitted to receive the wholesale incentive allowance, it will be driven out of business. To post a bond for the amount of the wholesale incentive allowance which FLM would receive if the injunction remained in effect would hardly compensate FLM for the destruction of the business it has spent ten years in building.

In weighing the equities in this matter, this Court can look to the relative financial condition of the parties. There is no question that Ford can better absorb a possible payment of wholesale incentive allowances which it would not be able to recover even if it were successful on appeal than the plaintiff would be able to withstand the withholding of such an allowance by a stay of this injunction pending the appeal and which would have the direct effect of driving the plaintiff, FLM, out of business.

This Court should carefully consider the specter raised by Ford (p. 4 of its memorandum) that it will advise its franchiseddealers that if this Court's decision is reversed on appeal, the dealers would be subject to a charge-back on all wholesale incentive allowances granted on sales to FLM plus interest on those wholesale incentives paid. If Ford is permitted to advise its franchiseddealers, either directly or indirectly or even by innuendo that they are liable for a charge-back on wholesale incentive allowances paid to them for sales made to FLM, common sense dictates that no franchised Ford dealer will pass on this wholesale incentive allowance to FLM, knowing that it remains liable to Ford for those allowances if Ford is successful on appeal. In essence, this would have the practical effect of preventing FLM from receiving the wholesale incentive allowance. An order should be issued by this Court to Ford making it clear that no franchised dealer is to be advised or even intimated to that Ford intends to ask for a return of all wholesale incentive allowances paid to that dealer on sales to FLM if Ford is successful on appeal.

The final criteria to be considered by the Court in deciding whether or not to stay its injunction pending appeal is "where does the public interest lie?" Private antitrust actions are a necessary adjunct to government actions in enforcing the antitrust laws and in maintaining competition. The public interest lies on a side other than that of the defendant Ford who has been found by this Court to have violated the antitrust laws.

In short, this Court must now consider whether or not it will stay the injunction it issued pending appeal with the attendant irreparable consequences to FLM of driving it out of business or it will permit its injunction to stay in effect under which circumstances the very most harm which could be caused would be that Ford, a multi-billion dollar corporation, would possibly be unable to recover approximately less than $100,000 in wholesale incentive allowances paid to its franchised dealers for sales to FLM. There is no question that the equities require this Court to deny Ford's motion and not to stay its injunction pending appeal.

Ford has not cited a single case under the anti-trust laws where the court has stayed its injunction pending appeal. The very cases cited by Ford (p. 6 of its memorandum in support of its motion) likewise denied the stay of an injunction pending appeal, rather than granted it. See also Roe v. Ferguson, 389 F. Supp. 393 (S.D. Ohio, 1974) and Adams v. Walker, 488 F. 2d 1064 (Seventh Cir. 1973). There are absolutely no grounds for this Court staying its injunction pending appeal.

CONCLUSION

Ford's motion to have this Court stay its injunction pending appeal should be denied in all respects.

Respectfully submitted,

JULIEN & SCHLESINGER, P.C.
Attorneys for Plaintiff

On the Brief:

Alfred S. Julien
Stuart A. Schlesinger
David Jaroslawicz

Affidavit of Robert MacCrate, Sworn to March 23, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

- x

73 Civ. 713 (TPG)

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT MacCRATE, being duly sworn, states:

1. This affidavit is submitted in further support of defendant Ford Motor Company's ("Ford's") motion to stay pending appeal the injunction issued in this action on March 17, 1976. It is prompted by certain representations made by plaintiff's counsel at the hearing held on March 22, 1976 with respect to the purportedly precarious financial condition of FLM Collision Parts, Inc. ("FLM").

2. The assertions by plaintiff's counsel that FLM has been forced to seek outside financing which is about to be terminated and that it is in imminent peril of going out of business are hardly new, having been made almost from the outset of this litigation three years ago:

(a) In an affidavit in support of a motion for preliminary injunction dated May 12, 1973, Stephen McKee stated in the concluding portion of paragraph number 3:

> "[FLM] has been forced to obtain temporary, limited outside financing to remain in business, which financing, at best, will not be sufficient to enable plaintiff to stay in business until the culmination of this case."

(b) In Plaintiff's Memorandum in Reply to Defendants' Memorandum in Opposition to Plaintiff's Motion for a Preliminary Injunction dated October 1, 1973, it is asserted at page 6:

> "It is obvious that a preliminary injunction is needed, ordering Ford to not withhold from its dealers on sales to FLM wholesale incentive and other credits granted to dealers on other sales, or the plaintiff might be in too much of a financial hardship to survive the further developments of this case."

(c) Still again, in Plaintiff's Additional Memorandum in support of Plaintiff's Motion for Preliminary Injunction dated February 25, 1974, the assertion is made at page 3:

> "The Capital of the corporation has declined further and since September 30, 1973 has approached 'zero', and the continuation of the existence of plaintiff is doubtful if a preliminary injunction is not granted immediately . . ."

3. The history of plaintiff's prosecution of this action, however, is inconsistent with these periodic assertions of a straitened financial condition. The incentive allowance was withdrawn on sales to FLM on November 1, 1972, yet this action was not commenced until February 15, 1973 -- three and one-half months later. Plaintiff did not file a motion for a preliminary injunction until three months after the complaint was filed and

subsequently withdrew that motion. While FLM filed another motion for a preliminary injunction on August 23, 1973, it did not bring the motion on for hearing and again withdrew the motion at the hearing called by the Court on March 11, 1974 when the Court set a trial date of April 1, 1974. The trial date was thereafter successively postponed at plaintiff's request to June 17, August 28 and, finally, September 23, 1974.

4. Moreover, while plaintiff now maintains that it has been facing vigorous competition from several franchised dealers for a number of months, P.X. 1003 indicates that FLM's sales revenues during the same period has shown a substantial increase, thus further belying its claim that it faces an immediate danger of going out of business.

5. In view of this evidence and the simple fact that FLM has actively carried on its business during the three and one-half years that have elpased since the wholesale incentive allowance was withdrawn, it is submitted that claims of FLM's imminent demise should be discounted by the Court.

6. Ford submits that a stay should be granted on the terms proposed in its moving papers. An important consideration in favor of granting the stay is that if Ford is successful on appeal it would be entitled to restitution of the full amount of the wholesale incentive allowance paid pursuant to the injunction. (See Restatement of Restitution, § 74.) To avoid inequity to the dealers, it would be necessary for Ford to give them notice of its

claim in this regard. It is recognized that such notice could result in discouraging arrangements between franchised dealers and FLM during the pendency of appeal. This problem, however, would be obviated by entry of a stay of the injunction during the appeal period. Moreover, by expressly advising dealers that Ford, if unsuccessful on appeal, would make payment of the wholesale incentive allowance for the period after April 1, 1976 this would, in fact, encourage arrangements between franchised dealers and FLM.

Robert MacCrate

Sworn to before me this
day of March, 1976

Notary Public

Affidavit of David L. Wasser, Sworn to March 23, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ENTERED

- - - - - - - - - - - - - - - - - - - -X

FLM COLLISION PARTS, INC.,
Plaintiff,

V.

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,
Defendants.

- - - - - - - - - - - - - - - - - - - -X

73 Civ. 713

AFFIDAVIT OF DAVID L. WASSER IN OPPOSITION TO STAY OF INJUNCTION

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

David L. Wasser, Attorney and Certified Public Accountant, practicing at 250 W. 57th St., New York City, deposes and says that he is submitting this affidavit in support of plaintiff's opposition to defendant's motion to stay the injunction ordered by this Court and that:

1. The deponent has been the accountant of and a counsel of plaintiff since its inception.

2. Plaintiff will suffer irreparable harm if the injunction is stayed pending defendant's appeal, as the company's records as reviewed by this deponent reflect that the company will be shortly insolvent if the wholesale incentive credits are not allowed at this time by Ford Motor Company to dealers on sales to plaintiff.

3. Plaintiff has survived the period since Ford banned credits to its suppliers until now by reason of tax refund credits; reduction of officers' salaries; discontinuance and partial distribution of its pension and deferred profit

sharing funds (planned for retirement purposes), despite premature interest forfeitures and loss of tax deferment because of the distribution; sale by the principals of personally owned securities; limitation of staff; retention of old vehicles; and bank loans incurred to carry this case.

4. (a) The records of the plaintiff, FLM, as of February 28th, 1976 (not verified by direct confirmation because of the urgency of this affidavit) show that FLM had $7,796.18 in its Cash In Bank Account and $76,462.72 in Accounts Receivable due from customers, of which only $44,805.79 was current and not overdue.

(b) Plaintiff's records as of February 28th, 1976, further show Accounts Payable due to suppliers of $111,284.74, including $105,733.40 owed to Pleasantville Ford, of which sum $34.748.63 was for the month of January, 1976 and past due. The rise of Ford parts prices has accentuated the pressure on the capital needs of the plaintiff.

(c) Plaintiff's records of February 28th, 1976, further show accrued taxes and expenses of $3,571.47.

(c) Plaintiff's records of February 28th, 1976 further show a bank loan of $10,000, granted by Bank of New York upon FLM's request for a $20,000 loan and payable in March but renewed by the bank upon the expectation of court relief in this case and upon the pledging by the principals of FLM to the bank of their personal assets to secure the loan.

Plaintiff FLM Collision Parts, Inc. cannot survive the

delay of an appeal in obtaining injunctive relief and this Court is urged not to stay said injunction.

Sworn to before me this
23rd day of March, 1976.

David F Klasser

Affidavit of Stephen McKee, Sworn to March 23, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

FLM COLLISION PARTS, INC.,

Plaintiff,

- against -

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

- x

73 Civ. 713 (TPG)

AFFIDAVIT IN OPPOSITION TO STAY INJUNCTION

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

STEPHEN McKEE, residing at 15 Underwood Road, Monsey, New York, being duly sworn deposes and says that he is submitting this affidavit in support of plaintiff's opposition to defendant's motion to stay the injunction ordered by this Court and that:

1. This deponent is Secretary-Treasurer of plaintiff FLM Collision Parts, Inc.

2. On information and belief, Ford dealers receiving a letter from Ford Motor Company permitting the receipt of wholesale incentive credits on sales of Ford crash parts to FLM Collision Parts, Inc., will enter into an arrangement whereby the wholesale incentive credits will be passed on to FLM in the form of a discount on purchases, as

(a) Ford dealers have continued to supply FLM with a charge of five per cent above dealer cost, and this

arrangement has been a profitable one for the dealers.

(b) During February 1976, this deponent approached Mr. Appel, the principal of a Ford dealer, namely, Empire Ford, located on Sanford Boulevard, in Mount Vernon, New York, and said principal indicated that it would be agreeable and profitable for that dealer and would be profitable for any of the other Ford dealers in the metropolitan area to enter into an arrangement with FLM, supplying FLM with Ford crash parts and granting a discount from purchases of parts for the wholesale incentive credits granted on these sales by the Ford Motor Company;

(c) This deponent believes that the present supplier of FLM, namely, Pleasantville Ford, and other Ford dealers, will enter into a similar agreement, upon the issuance of a letter by Ford Motor Company to it, allowing the incentive credits on sales to FLM.

Sworn to before me this
23rd day of March , 1976.

Stephen McKee

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney — certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation — shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ Individual Verification — being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification — the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at

Check Applicable Box

☐ Affidavit of Service By Mail — On 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service — On 19 at deponent served the within upon herein, by delivering a true copy thereof to personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on 19

.....
The name signed must be printed beneath

NOTICE OF ENTRY

Sir:-Please take notice that the within is a *(certified)* true copy of a

duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

JULIEN & SCHLESINGER. P.C.

Attorneys for

Office and Post Office Address

2 Lafayette Street

NEW YORK. N. Y. 10007

To

Attorney(s) for

2089a

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

JULIEN & SCHLESINGER. P.C.

Attorneys for

Office and Post Office Address

2 Lafayette Street

NEW YORK. N. Y. 10007

To

Attorney(s) for

Index No. 73 Civ. 713 Year 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FLM COLLISION PARTS, INC.,

Plaintiff,

- against -

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,

Defendants.

AFFIDAVITS IN OPPOSITION TO STAY OF INJUNCTION

JULIEN & SCHLESINGER. P.C.

Attorneys for plaintiff

Office and Post Office Address, Telephone

2 Lafayette Street

NEW YORK. N. Y. 10007

(212) 962-8020

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

2089A

1900-©1973 JULIUS BLUMBERG, INC. 80 EXCHANGE PLACE, N. Y. 10004

Transcript of Hearing on Motion For Stay of Injunction, March 22-23, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

FLM COLLISION PARTS, INC.,

Plaintiff

-against- : 73 Civ 713

FORD MOTOR CO. AND FORD MARKETING CORPORATION,

Defendants.

----------x

BEFORE: HON. THOMAS P. GRIESA,

District Judge

New York, New York
March 22, 1976 - 3:15 p.m.

APPEARANCES:

JULIEN & SCHLESINGER, P.C.
Attorneys for plaintiff
BY: STEWART S. SCHLESINGER, ESQ.,
Of Counsel

SULLIVAN & CROMWELL
Attorneys for defendants
BY: ROBERT MacCRATE, ESQ.,
WILLIAM M. DALLAS, ESQ.,
Of Counsel

THE COURT: I don't need a repetition of the arguments in the brief. What I do need is -- do I understand it that if a stay is not granted, Ford intends to advise its dealers that in the event it succeeds on appeal, it will attempt to recover from them any monies made during the course of the appeal?

MR. MacCRATE: Your Honor, we --

THE COURT: If so, I will amend my injunction. I think that is unconscionable.

MR. MacCRATE: May I explain the unusual situation that we are in? This is an extraordinarily different situation. This is not a prohibitory injunction. It is a mandatory injunction in favor of a third party not before the Court.

Therefore, what is directed is a payment of money by this injunction pending appeal to a third party that is not before the Court. That third party --

THE COURT: It was never brought before the Court. There is no problem. You always raise these complications which turn out to be not complications. It is very simple, Mr. MacCrate, to do all that is necessary to eliminate all these mysterious situations. If FLM is buying now from Pleasantville, or whoever it is buying, and -- it isn't buying from all the dealers in the New York area, and pending

an appeal there might be a perfectly good way to work out a situation where perhaps you won't send that letter out to all the dealers and we would just find out what Pleasantville's intentions would be pending the appeal.

I don't see any reason not to do what is necessary to work out some practical proposition. If Pleasantville has no intention of passing on, I can't order it to pass on, but, you know, at least one would know what the situation is and then maybe FLM would deal with somebody else, but we don't have to be poking around a lot of uncertainties. We can adjourn this hearing until tomorrow and find out what the facts are.

Has FLM spoken to Pleasantville?

MR. SCHLESINGER: My client has the negotiations pending with either the present dealer or an alternate --

THE COURT: Who is the present dealer?

MR. SCHLESINGER: Pleasantville.

THE COURT: You don't deal with anybody else right now?

MR. SCHLESINGER: There would only be two or three at the very most in this area.

THE COURT: Who is FLM dealing with?

MR. SCHLESINGER: Pleasantville.

THE COURT: So why couldn't -- obviously, it is

entirely up to Pleasantville to determine what it wants to charge to FLM and neither Ford nor the corporation has any business coercing Pleasantville, telling them what they ought to charge. But I think that I am entitled to know what the facts are, and Ford is entitled to know what the facts are, and so we are not dealing in a lot of mysteries.

What are these negotiations hanging on? Is Pleasantville worried about what the Court is going to do or what Ford is going to do?

MR. SCHLESINGER: Pleasantville is waiting to find out what will happen. If they receive such a letter as proposed by --

THE COURT: Why couldn't a person from Pleasantville come in here? I can assure Pleasantville that there can be no retaliation or anything like that by Ford.

MR. MacCRATE: This is not retaliation.

THE COURT: Anywa, why can't the fellow from Plesantville simply come down here?

MR. MacCRATE: This injunction applies to any Ford dealer in the metropolitan area.

THE COURT: Mr. MacCrate, pending appeal we can simplify it. I don't know that you should, pending appeal -- if you are really going to take an appeal, maybe it isn't appropriate to send that letter out. Just do something practical. FLM is not dealing with --

MR. MacCRATE: I am trying to be as practical as I can --

MR. SCHLESINGER: We can contact Pleasantville today and also the alternate we are planning to deal with and have them both before your Honor.

THE COURT: They might be worried --

MR. SCHLESINGER: They are.

THE COURT: They know that there is an injunction. They know there is an appeal. I don't know what Ford -- whether Ford has been in touch with them or not. But I think they should be -- they certainly should be told exactly where they stand.

Now, it is free to them that they can sell to FLM, not sell FLM, they can charge them a mark up of 300% or zero, it is up to them, but they should not be in a position of wondering if they are going to some day get a big charge back or they are going to get in bad with Ford or they are going to violate the court order or get in bad with the Court of Appeals or any one of fifty different things.

MR. SCHLESINGER: I would bring the other possilbe dealer before your Honor as well so he can be apprised of the same situation.

THE COURT: Again, it is entirely up to them. I am not requiring that they come in. If they want to come in, so that we can relieve everybody's mind of the mystery

that would probably help.

MR. SCHLESINGER: I am afraid though that the dealers fear Ford, in other words, if a letter was sent out, they are ready to sign an agreement to go ahead as we did in the past, but to come into the court this will have to find out.

THE COURT: I am just trying to -- I have this in mind:

I want to, of course, hear what I need to hear about the application for a stay, but right off the bat it seems to me that what we have to focus on is, pending an appeal, this FLM particular situation. FLM is not dealing with all the Ford dealers in the New York area, and as far as FLM is concerned, that particular letter I'm sure is -- you know, they don't have to -- they don't have to have all the letters in the New York area. It could be that if Ford is going to appeal, pending an appeal we can have a somewhat more limited notice, so to speak, which would make clear to the particular parties FLM is dealing with exactly whatthe rights are, then we can deal with the application for a stay more intelligently . It won't be a big problem of all the dealers in the area -- it is a very limited problem, about FLM and I just think the matter would be a lot clearer.

MR. SCHLESINGER: If they can't appear, I can certainly report back to you the facts as it stands between

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FLM, Pleasantville and the other proposed dealer.

THE COURT: When can you have that?

MR. SCHLESINGER: I will meet with the FLM people immediately.

THE COURT: In the meantime, what is the situation about FLM's financial condition?

MR. SCHLESINGER: Very simple, your Honor, without the economic benefits of your Honor's decision we are out of business. If they are allowed a stay and we cannot receive the incentive we are out of business.

THE COURT: How have you been hanging on?

MR. SCHLESINGER: We have used up all the capital that we have and he's been just keeping the salaries down very, very low, taking basically no money for himself. They had to pledge their personal assets, and the bank will not go beyond this week. We are talking about $20,000.

THE COURT: I think what you better do is to get an affidavit in here on that. Obviously the business has continued, it continued during the unusually long period of time that it took to get the decision out. I guess everybody thought the decision would be earlier.

Well, Ford might argue that if it could keep going that long, it could keep going somewhat longer. I think what you have got to do -- I would be certainly interested, and

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I'm sure Ford would be and the Court of Appeals would be, interested in knowing hte facts in affidavit form about your financial condition. If there is a situation about borrowing or whatever, but that isn't really in the papers and I don't think it can be just orally represented in discussion.

MR. SCHLESINGER: I want to bring to your attention all our arguments as to why there shouldn't be a stay are laid out in the memorandum. However, it is interesting to remember that Ford had made the incentive for approximately a year after they changed their own policies, which came out during the trial, after they had changed their own policies, they still continued to pay the incentive to FLM so the damages aren't that significant to them.

THE COURT: Please. I will see you at 11:30 tomorrow. But I will need to have by 10 o'clock or so at the latest, filed and served on Ford, the affidavit describing your claims about irreparable harm and I think I would include in that affidavit, if you can, what the situation is about negotiations, because you haven't had a lot of time but there ought to be a way, I would think, to -- maybe it can't be, but hopefully by the end of the day something can be resolved about the willingness of Pleasantville to --

what they would do on the mark up.

Now, that is their business decision and I would not presume to guess what they would do.

MR. SCHLESINGER: Except your Honor's decision gives us the opportunity not only to go to Pleasantville, but gives us an opportunity to seek this from other dealers who might be very willing to give it to us, it gave them an economic benefit in the past, so we will present the situation as it exists, between FLM, Pleasantville and this other that we are dealing with, but there could be others.

MR. MacCRATE: I respectfully object to any delay of the Court's ruling with respect to this stay. I believe that we are entitled to seek relief in the Court of Appeals, if your Honor is going to deny it, and by this --

THE COURT: I am adjourning this until 11:30 tomorrow. I don't have all the facts.

MR. MacCRATE: There has been every opportunity to put the facts before you right here and now, and for the plaintiff to suggest at this time that there is more information to be brought before the Court, I think is working a prejudice upon us. There is a further question with respect to the judgment that I believe your Honor will wish to correct the judgment in order to include a recital with respect to the supplemental opinion, we did not presume, in

retyping the judgment in advance of the Court's ruling, to include reference to action that the Court had not then taken, and it would be appropriate on line 11 of the judgment to make an insertion and a supplemental decision on damages and attorneys' fees having been duly rendered in an opinion dated March 17, 1976, and the said opinion, constituting the Court's findings of fact and conclusions of law ---

THE COURT: Did you submit it -- you submitted the form of judgment I signed, right?

MR. MacCRATE: Your Honor --

THE COURT: I don't know why you couldn't have put that in. We talked about it at our hearing. It was an oversight of mine not to catch it when I signed it, but I really don't understand you not putting it in. YOu submit your amended judgment with your correction.

MR. MacCRATE: The reason it was omitted, your Honor hadn't done these things and we therefore ---

THE COURT: You knew that I was going to do them, didn't you?

MR. MacCRATE: I didn't know whether there would be a supplemental opinion --

THE COURT: We talked about it at the hearing. I just don't understand it. You submit the amended judgment to correct the oversight, please. Do that by the end of the day. We will adjourn this until 11:30 tomorrow.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

FLM COLLISION PARTS, INC.,

Plaintiff,

-vs- : 73 Civ. 713

FORD MOTOR CO., and FORD MARKETING CORPORATION,

Defendants.

----------x

March 23, 1976
11:30 A.M.

B E F O R E :

HON. THOMAS P. GRIESA, District Judge.

A P P E A R A N C E S :

JULIEN & SCHLESINGER, P.C.
Attorneys for Plaintiffs
STEWART S. SCHLESINGER, ESQ.
DAVID JAROSLAWICZ, ESQ., of Counsel

SULLIVAN & CROMWELL, ESQS.,
Attorneys for Defendants
ROBERT MAC CRATE, ESQ.,
WILLIAM M. DALLAS, ESQ., of Counsel

WILLIAM A. ZOLBERT, ESQ.,
Office of General Counsel
Ford Motor Co.

ALSO PRESENT:

DAVID WASSER

THE COURT: At the hearing yesterday I asked to have information about the negotiations which were said to be going on with Ford dealers.

I have received some information in the form of affidavits of Mr. Wasserman and Mr. McKee.

What is the latest, Mr. Schlesinger?

MR. SCHLESINGER: Well, on the issue of dealing with franchise dealers, Mr. McKee has an understanding with Pleasantville that he will sell FLM at five percent over arrangement.

With Empire --

THE COURT: Why don't you come up, Mr. McKee.

MR. SCHLESINGER: Do you want me to ask the questions?

THE COURT: Take the stand, Mr. McKee, so we can have this on the record.

S T E P H E N M C K E E , called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SCHLESINGER:

Q Mr. McKee, have you discussed with anyone at Pleasantville Ford entering into arrangement to purchase crash parts on a particular dollar arrangement?

A I have.

Q With whom?

A With dealer principal Mr. Borelli.

Q Can you tell us what that arrangement will be in the event that FLM will be able to achieve the benefits on the discount of crash parts?

A The arrangement as it now stands is five percent over dealer cost plus the incentives to be credited to FLM Collision Parts.

Q In addition to Pleasantville, have you discussed this with any other franchise dealer?

A Yes.

Q Which ones?

A Empire Ford and Mount Vernon.

Q Can you simply tell us what the understanding with Empire is?

A The understanding was the exact same. I discussed it with the principal, Mr. Nathaniel Appel, and the arrangement was exactly the same, five percent over dealer cost and the incentives to be credited to FLM.

Q Have you begun discussions with any other -- do you contemplate any other discussions with other franchise dealers?

A In the event of problems with any of these

dealers, where they are discontinued or something of that nature --

THE COURT: I am not hearing you, Mr. McKee.

A In the event of problems with either of these two dealers, in such case if the dealership was terminated, then I would discuss it with other dealers in the area.

THE COURT: You have not --

THE WITNESS: I have not at this point.

THE COURT: Right now where are you buying your parts from, Pleasantville?

THE WITNESS: Pleasantville Ford.

Q Have either Pleasantville or Empire raised the question with you with reference to the subject of this litigation, the question of Ford passing on the discounts to them when they sell to you for the crash parts?

A They have not raised the question.

Q How many dealers would you need to satisfy your purchasing requirements -- how many dealers in the area would you need to satisfy your purchasing requirements?

A I would say two.

Q In addition to purchasing of parts, I discussed with you today your economic picture at your company, at

FLM --

A Yes.

Q -- can you briefly give us an outline of what the economic status is of FLM at this moment?

A At this point, as of February 28th, we were behind, I believe, $34,000 in our payments for January for parts purchased through Pleasantville Ford.

Q Have you told me, Mr. McKee, that in the event that you don't receive the incentive arrangement with either Empire or Pleasantville, or some other franchise dealer, that the likelihood is that FLM will become insolvent?

A Yes. If I do not receive injunctive relief it definitely will become insolvent.

THE COURT: Why is that?

THE WITNESS: At this point our equipment is practically non-existent. We are running vehicles which we have --

THE COURT: This is a very large room, and you have to speak a little louder and a little slower.

THE WITNESS: At this point we are running equipment which should be replaced. The equipment now, such as our delivery trucks, it is almost impossible --

THE COURT: How many trucks do you have?

THE WITNESS: We are running three.

THE COURT: How old are they?

THE WITNESS: 1970, 1971 and all three vehicles at this moment are in need of replacement.

BY MR. SCHLESINGER:

Q What about your cash flow situation?

A The cash flow situation at this point, at February 28th I believe I had $7900 in the bank, and to my recollection, at that point I owed $108,000 for parts. This is from memory.

Q Have you paid for your purchases for the month of February, as of yet?

A The month of February? No.

Q Has it been your custom and practice to pay for the previous month's purchases by the 5th of the month , the subsequent month?

A Not by the 5th of the month. By the 20th of the month.

Q Are you behind in those payments?

A I am.

THE COURT: You still have not paid all of January?

THE WITNESS: At this point I have paid January.

THE COURT: When did you pay January?

THE WITNESS: January -- from my recollection, March 15th.

THE COURT: You have not paid February yet?

THE WITNESS: February, I have paid one payment of it. I believe at this point I owe $40,000 for February.

THE COURT: And you paid January off?

THE WITNESS: Yes.

THE COURT: And you owe $40,000 for February?

THE WITNESS: Yes.

THE COURT: You didn't pay January until March 15th?

THE WITNESS: March 15th, yes.

THE COURT: What have you got to -- what is your cash situation now?

THE WITNESS: The cash situation at this moment, is I have applied to the bank for renewal of a $10,000 loan, which I had originally applied for a $20,000 loan but could not get it.

THE COURT: When did you make that application?

THE WITNESS: The application for the $10,000?

THE COURT: Yes.

THE WITNESS: I placed it in the hands of the bank yesterday for renewal today.

THE COURT: The original application for --

let's go back -- for the $20,000 loan application, when did you make that?

THE WITNESS: Originally, December, the last week of December.

THE COURT: Of 1975?

THE WITNESS: Yes.

THE COURT: And they granted you $10,000?

THE WITNESS: $10,000 on the strength of the litigation we are now in.

THE COURT: What bank is this?

THE WITNESS: County Trust, Yonkers, New York, now known as the Bank of New York.

THE COURT: Was this after the decision?

THE WITNESS: This was after the 19th of December, yes.

THE COURT: When is that loan payable?

THE WITNESS: The $10,000 was payable today.

THE COURT: It is payable today?

THE WITNESS: Yes.

THE COURT: What are you doing about that?

THE WITNESS: I have asked for a renewal.

THE COURT: What did they say?

THE WITNESS: At this moment, I have not got the answer back, as I have not been at the bank this

morning.

THE COURT: Have you asked them for any additional money?

THE WITNESS: I have asked for additional money, but been refused. In fact, on the $10,000 loan I had to pledge personal assets.

BY MR. SCHLESINGER:

Q In your request for the addition, which you are waiting to hear the answer on today, did you mention to the bank the status of the lawsuit?

A Yes.

Q The lawsuit involving Ford?

A Yes.

Q Was that a consideration?

A Yes.

Q From the period of time that Ford discontinued the incentive and you stopped receiving it, is it a fact, Mr. McKee, that there has been a reduction of salaries to the officers of FLM?

A Yes.

Q And have you discontinued and made partial distribution of your pension and deferred profit plans?

A Yes, we have.

Q Were both these done in order to keep the

company going?

A To keep it solvent, yes.

Q Did you take some advantage of certain tax deferments?

A Yes, we did.

Q Again for the purpose of keeping the company going?

A Yes.

THE COURT: What does that mean?

MR. SCHLESINGER: They had certain tax advantages which they could have carried over for a longer period of time and they had to take advantage of them in the period that they needed the cash, and it made it more liquid at that time.

Q Did you sell off any of your personal securities?

A Yes.

THE COURT: How much and what did you use that for?

THE WITNESS: The personal securities which I sold off?

THE COURT: Right.

THE WITNESS: Were used to maintain my home at this moment.

THE COURT: In other words, you dipped into

your savings in lieu of receiving profits from FLM?

THE WITNESS: Yes.

THE COURT: Can you tell me about how much?

THE WITNESS: I think the exact figure was $10,800.

Q Is it your opinion now, Mr. McKee, based on all the facts, your economic status and potential of getting crash parts on these new arrangements, that if you do not get them immediately and do not get the economic benefits immediately that you will suffer insolvency and possibly bankruptcy?

A Yes, it is.

MR. MAC CRATE: Objection, your Honor.

THE COURT: It is a little leading, but that is all right.

MR. SCHLESINGER: I have no further questions.

THE COURT: All right, Mr. MacCrate.

CROSS EXAMINATION

BY MR. MAC CRATE:

Q Mr. McKee, you referred to conversations with a representative of Pleasantville Ford.

THE COURT: Just one moment, Mr. MacCrate.

(Pause)

Q You referred to conversations with a

representative of Pleasantville Ford.

Can you tell us when and where that conversation occurred?

A The conversation occurred originally when I developed my business arrangement with Pleasantville Ford.

Q Your testimony today was referring to a conversation you had with Pleasantville Ford back in 1973.

A Correct.

Q Would you give us, as best you can recall, the substance of the conversation at that time?

A The substance of the conversation was that Pleasantville Ford would supply us parts at five percent over dealer cost, but at that period, that no incentives could be claimed against such sales.

Q At any time since --

THE COURT: I thought I was told yesterday that there were negotiations going on now. What is this about a 1973 conversation? I was to get a report, and I thought he was talking about a current conversation.

This is very misleading to me.

MR. SCHLESINGER: Not at all, your Honor. As far as Empire is concerned he has current negotiations. Pleasantville has made the commitment to him.

THE COURT: When?

MR. SCHLESINGER: Initially to him, but they have never changed.

THE COURT: What was their commitment?

MR. SCHLESINGER: To sell him and give him the benefit of the incentive, five percent over dealer cost. Empire is a recent negotiation because he feels he needs two possible sources of supply, he doesn't want to rely exclusively on Pleasantville.

Pleasantville is there available to him, now he is turning to Empire and had recent talks with Empire, to get them as a supplier in the event that anything happens with Pleasantville.

He also wants to have available two sources of supply for the crsah parts.

THE COURT: I have no desire -- I had no desire yesterday nor do I have a desire today, to inquire about his negotiations.

For some reason I was led to believe yesterday that there might be a problem with these people. If there is no problem, it is of no concern to me. I will assume, unless I am told otherwise, that FLM can obtain the same thing that it obtained before Ford changed its policy. That was the assumption that I went on, and I will assume

that.

MR. SCHLESINGER: That is correct, your Honor. I don't raise that.

The only --

THE COURT: How did we get into this problem of getting into the negotiations?

MR. SCHLESINGER: Your Honor raised the point, and we did also in our papers, that a letter going out to any franchised dealer saying that in the event you sell -- we have this on appeal, and if we are successful on appeal, that we are going to charge you back for all the money that you paid out.

THE COURT: What is the reason for getting into this?

MR. SCHLESINGER: I am satisfied that they are going to receive the incentive credit and the five percent discount.

THE COURT: All Ford can do it to make the discount available. That is the beginning and the end of Ford's duty, and Ford obviously has a duty not to go around and subvert it, try and influence the negotiations, and I can prevent that.

Why do I have to even concern myself with what goes on between FLM and its dealers?

MR. MAC CRATE: Well, your Honor, at no time since November of 1972 has the wholesale incentive been available on resales to FLM.

The discussions that this witness had, to which he has just testified, with Pleasantville Ford occurred six months later. There was no wholesale incentive at that time being granted.

THE COURT: You are not answering my question. My question is, I am concerned, as the District Court in this case, only in giving whatever remedy is appropriate against the defendant or defendants here, and my injunction simply requires Ford to make available to the dealer the wholesale incentive allowance on the same terms when they sell -- the dealer sells to FLM as when it sells to other people.

That is the beginning and the end of my responsibility in this case, and if Ford does that Ford has fulfilled all its duties as far as I am concerned.

What I would draw and have drawn is an inference that since at least one company, or one Ford dealer was willing to pass on the wholesale incentive allowance up to the very minute when Ford took its action, I think it is a reasonable inference that Mr. McKee and FLM could go out and do the same thing again.

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But that is not up to me to supervise. I don't know quite why yesterday I began to get into this. I guess I was -- if Ford does its duty then what happens between FLM and the dealer -- FLM has to sink or swim depending on its negotiations.

MR. MAC CRATE: May I, your Honor, direct myself to the basic question presented by our application for a stay?

It does entail what goes on between the franchise dealers and FLM, and for this reason: We are requesting the stay in order to protect the right of Ford to claim restitution of the wholesale incentive in the event Ford is successful on appeal.

THE COURT: The possible restitution right that you would have -- what is it?

MR. MAC CRATE: If this Court's decision were reversed on appeal, under established laws stated in the restatement of restitution, Section 74, Ford would have a right of restitution, but this is a highly unusual kind of a judgment.

THE COURT: No it isn't unusual at all.

Mr. MacCrate, if you get a stay from the District Court or from the Court of Appeals, you have gotten your stay. You don't have to make available that

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wholesale incentive allowance, and that is fair and square.

But if you don't get a stay, you, in my view, will be abiding by the injunction as presently framed. You will be complying with an existing Court order, which tells you -- tells Ford to make available the wholesale incentive allowance, and that will be the order of the Court until it is changed.

If you are making an incentive allowance available, pursuant to a Court order, the people who receive that incentive allowance are entitled to that allowance, and if they pass it on they will be doing what theyare entitled to do, and there is no law that I know of which says that if at a later point that injunction is vacated or reversed, that they owe you all that money back. I don't know of any such law on any books.

MR. MAC CRATE: That is the basic legal proposition, your Honor, on which we stand. This is a payment directed to a third party. Ordinarily payments with respect to judgments are made to defendants.

THE COURT: I am direcitng only a payment to the dealer.

MR. MAC CRATE: And the payment to the dealer, who is a third party, is just the same from the point of view of the defendant being ordered to make the payment

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as if it were going to the defendant, except when it comes to restitution, and a claim is made to the dealer that that money should be repaid in equity to the dealer, that dealer is entitled to be put on notice.

THE COURT: You are assuming something that I think is fallacious, and that is that the dealer, who receives money from you under a Court order, which is the order of the Court so long as it stands, whether it is a day or a month or six months, you are assuming that if that order is later changed and vacated the dealer will have the obligation to pay you all that money back.

I know of no basis for holding that.

MR. MAC CRATE: May I read to your Honor Section 74 of the Restatement of Restitution?

THE COURT: Yes.

MR. MAC CRATE: "Judgment subsequently reversed. A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable or the parties contract that payment is to be final.

"If the judgment is modified there is a right to restitution of the excess."

Your Honor, it is directing myself to that provision to assure that the situation, with respect to the franchise dealers, is equitable and that Ford, under this general proposition of law would be entitled --

THE COURT: I am not sure it applies. You have not briefed that at all. I am not sure it applies because it deals with a straight judgment.

Thirdly, it is not as flat as you assert because it says restitution will not be made if it is inequitable.

MR. MAC CRATE: And if we made payment without advising the franchise dealers of the fact that we would have the right, as we see it, to make claim to restitution, I suggest that it would be inquitable on our part not to give that advice.

THE COURT: That is just a way of subverting the Court's injunction.

If the Court is going -- look, if -- let's face it. If there is a reason to have this injunction go forward now, even in light of your appeal, then I would say that that reason embodies the following underlying reasons, namely, that the situation with FLM is sufficiently serious so that FLM should have the benefit of what the Court thus far has found it is entitled to.

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Secondly, the id that by granting this allowance all Ford is doing is making available to dealers who sell to FLM the exact same allowance Ford provides to other people, the Court has not thought up some new, novel indebtedness or anything of the kind. It is simply telling Ford that when you sell parts to FLM, to an independent body shop, or where your dealers do, give the incentive allowance in the same way that you would if the incentive allowance -- if the parts were sold directly by the dealer to the independent body shop.

It is really, in my view, a -- it is just a rather minor extension of the type of allowance which Ford grants, I assume, in terms of hundreds of thousands or millions of dollars to all kinds of other people, in other situations specified in our rules.

If I or if the Court of Appeals refuses to stay this judgment, I am telling you that the idea isn't for you to threaten these dealers with restitution actions which would effectively subvert the whole idea of the injunction; it is for the injunction to go forward and be complied with, and at least temporarily to have these payments made and for you not to get them back.

I think we better face that right here and

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now, and if -- because otherwise the injunction is a dead letter. If you are able to write to the dealers saying that in the event we win on appeal we will charge back, we will sue you and claim all this money back, why, then you are creating a stay which the Court has refused. You are frustrating the injunction, and that would be, to me, an absolute absurdity.

We either ought to stay the injunction or ought not, and not have a situation where we have an injunction outstanding and then you write around and subvert it.

MR. MAC CRATE: We don't regard it as subverting to state one's rights. I would regard any restriction upon our right to express this to the dealers as a constitutional deprivation without due process and also in violation of our right to free speech, even as a large corporation.

We can make such statements, and it is inherent in protecting this triangular relationship that we have, and in which Ford has a great interest in protecting.

This is a stay with an undertaking by Ford. It is -- Ford is saying, we will put up an undertaking. We will write to all the dealers and we will say to them --

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THE COURT: How does that permit FLM to pay its bank loan and pay its payables?

MR. MAC CRATE: We would -- we will have a bond, your Honor, that will assure payment. We will tell the dealers that we have put up this bond, and that the monies will be accrued and they will be paid, assuming the affirmance of the judgment.

This is a way that there can then be free negotiation with any dealer. This is what we are proposing.

So far --

THE COURT: How does that put any cash in the hands of FLM?

MR. MAC CRATE: Well, one aspect omitted from the interrogation of Mr. McKee to this time is what is coming in to FLM at this time.

It is receiving substantial payments from those to whom it sells. It is also in the position -- it has receivables that are constantly being paid. It has apparently been in a position to finance its situation in the intervening months.

THE COURT: They are by their own testimony -- they were a full month behind in paying January. They are behind on February to the tune of $40,000. You can

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cross examine on that, and you are perfectly able to do that, but I would think that if that is true your provision of a bond guaranteeing damages accruing in the interim doesn't help them very much; it is not cash in their pockets.

MR. MAC CRATE: The money paid to the franchise dealers is not cash in their pockets either, and it takes time for it to pass through, your Honor, and there has to be submission of claims. That amount has to be paid over.

These things aren't automatic payments by Ford to the defendant, of course.

THE COURT: What it does, it reduces their indebtedness to their dealer; they don't have so much to pay.

MR. MAC CRATE: There is a receivable that is being established in the form of a bond, if your Honor will, under the arrangement that we suggest. It frees the situation between the franchise dealer and Mr. McKee, of the cloud of restitution.

THE COURT: What about the question raised by Mr. Mac Crate, Mr. McKee, what are your -- what is your cash flow now?

THE WITNESS: I don't have the actual figures,

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your Honor, in my head at the moment.

THE COURT: Was that the first time you fell behind.

THE WITNESS: This was the first time we had ever fallen behind in payments.

THE COURT: Why did you fall behind?

THE WITNESS: Our sales -- our cash wasn't coming in as fast as it normally had done up to that point, that we did reach --

THE COURT: So during this whole time you have been able to make your payments to Pleasantville?

THE WITNESS: Yes, your Honor.

THE COURT: Even without the whole incentive allowance?

THE WITNESS: Yes.

THE COURT: Why did you fall behind?

THE WITNESS: I would say the main reason for it is the fact that our cash flow changed. In other words, on February purchases, particularly our January purchases became heavier than they normally would have been, that actually our purchases were heavier but our receivables would not start coming in --

THE COURT: Why were the purchases heavier?

THE WITNESS: Because in the month of January

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you had many more accidents in this particular area.

THE COURT: So your sales were up?

THE WITNESS: Our sales were up accordingly, but our receivables would not start coming in until during the month of February and March.

THE COURT: Do you expect that situation to go -- that has nothing to do with the wholesale incentive allowance, does it?

THE WITNESS: Our cash flow at this moment, we are really down to the point where I would actually have to consult with my counsel to see what figures we have for our last financial position.

MR. SCHLESINGER: Your Honor, I --

THE COURT: Wait a minute. What difference would the wholesale -- suppose the wholesale incentive allowance went into effect now, what difference would it make?

THE WITNESS: If it went in as of this moment, as Mr. MacCrate stated, it would not be payable immediately. The claim is then made on Ford Motor Company within thirty days of the day of sale.

So in thirty days time the wholesale incentive would be credited to my account.

THE COURT: What do you estimate that would

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amount to, about how much per month, have you got any estimate on that?

THE WITNESS: Roughly speaking, I would say $8,000, $9,000 a month. This is rough off the top of my head at the moment.

THE COURT: What form does that take? You get a check back for eight or $9,000?

THE WITNESS: A credit back not a check, your Honor.

THE COURT: So it reduces what you owe --

THE WITNESS: It reduces the amount payable to the dealer.

THE COURT: What are your receivables, what are your total receivables to Pleasantville each month now -- your purchases per month?

THE WITNESS: Purchases per month -- I believe in January -- it is very hard for me to keep such figures in my head, your Honor, because it is something I don't check on a daily basis. With $82,000 sales in January, I would say our purchases must have approximated $68,000, somewhere in that region, for January.

THE COURT: Is that about right, Mr. Schlesinger?

MR. WASSER: I think it's a little higher than that. It would be somewhere in that area.

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THE COURT: You think it was about 70 and 80 sales in January?

MR. WASSER: The purchases from Pleasantville would be --

THE COURT: I am talking about FLM's sales. How much were they in January?

MR. WASSER: I think in January -- that peak period of $82,000 to customers.

THE COURT: About $80,000?

MR. WASSER: Yes. That was the --

THE COURT: What were the sales from Pleasantville?

MR. WASSER: There is a fifteen percent gross profit, so it would be approximately 85 percent of the sales.

THE COURT: Which would be what?

MR. WASSER: We take off $12,000 approximately--

THE COURT: About $68,000?

MR. WASSER: About $70,000.

THE COURT: 68 to 70.

MR. WASSER: Yes.

THE COURT: That was a big month. Is your month usually a little smaller?

THE WITNESS: It's generally smaller than that.

THE COURT: It was a winter month, bad weather.

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THE WITNESS: Yes.

THE COURT: What is an average month?

THE WITNESS: 64 to 68,000 sales.

MR. MAC CRATE. Might I point out, your Honor, that the wholesale incentive --

THE COURT: So you had -- we can figure it just roughly, 70,000 versus 60,000 that you owe Pleasantville, right?

THE WITNESS: Correct.

THE COURT: If you got the wholesale incentive, it would reduce your cost to Pleasantville by roughly 8,000.

THE WITNESS: Yes, your Honor.

THE COURT: That's a big difference.

MR. MAC CRATE: Your Honor, the wholesale incentive that is under consideration is one that, according to the witness, would only reach FLM passing through the dealer after the dealer's claim sometime in June.

If the money is being put aside, if the bond is posted, with the prompt appeal we are taking, we are trying to bring this on immediately, the whole matter can be disposed of in the Court of Appeals in that time.

THE COURT: I don't think you are going to count on that. When do you think it would be argued?

MR. MAC CRATE: In another situation, I have had indicated to me with a very current filing that we would be heard before the Court recesses this summer.

THE COURT: When do you predict the appeal will be heard in this case?

MR. MAC CRATE: I am reluctant to predict a Court's action in that way, but I can only say that in cases that have been noticed within the current month, they are, according to the administrative office of the Court of Appeals, in some instances going to be heard late this spring.

MR. SCHLESINGER: Your Honor, may I be heard?

THE COURT: When will your brief be filed?

MR. MAC CRATE: Well, we have to lodge our papers and proceed, and we will be assigned a date, your Honor.

THE COURT: You can file your brief any time. When will your brief be filed? You are the appellants. When will your brief be filed?

MR. MAC CRATE: I have not focused on a precise date. But we are moving it along as quickly as we can, and we will make every effort to bring it on before the Court recesses.

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THE COURT: You have been standing here telling me about how promptly it will be on. You are the one to file your brief.

MR. MAC CRATE: And we will proceed promptly.

THE COURT: When will that be?

MR. MAC CRATE: Your Honor, standing here on my feet, I have not to this moment been asked that question, nor asked it of myself, and to say by what date preciselywe will have our brief ready, we can certainly have it ready in the course of April.

THE COURT: So your brief will be filed no later than the end of April?

MR. MAC CRATE: That's what I would anticipate, your Honor. Mr. Fensterstock will be the one to handle the scheduling, and he would, presumably, establish that schedule at the time of the conference that he has in each appeal.

MR. SCHLESINGER: Your Honor, number one, it is not just a question of him getting a credit against sales. The availability of incentive allowances gives him an increase in volume, gives him a chance to go out and compete and make more sales, not just sitting around and waiting for him to get credit to his account, it puts him back in business essentially to compete in the market,

which is as important as receiving the credit for incentive allowance.

As far as Mr. --

THE COURT: What about this point of restitution? Nobody has briefed this. This is all talk.

MR. SCHLESINGER: First of all, the restitution is a restatement, it's not been adopted -- secondly, the restatement itself talks about if the sale if final then there is no question of restitution.

In this case each sale is a final sale. Each purchase of a crash part is a final sale of itself. It is not an open account for each part. Interestingly enough, when Mr. MacCrate talks about having an appeal brought on by the end of April, which I seriously doubt, and if that is so, where is the real damage to Ford?

You are talking about $68,000, $70,000, or $80,000, out of millions where they give credit. You are talking about only a fraction of that money. There is no irreparable damage to them in dollar number.

But it is to us not only in dollar number but in the availability to compete, and that is terribly important.

MR. MAC CRATE: The injury, your Honor, from Ford's point of view, is in its relation with its dealers

and dealing openly, honestly with their dealers and --

MR. SCHLESINGER: We haven't dealt any way but open and honest. How does that change the method of dealing with your dealer? It puts us in the terrible position of getting money from the bank. You talk about why he's been able to survive. He has had a cash flow because he's borrowed , because he's pledged his own assets, because he's done everything personal to get capital. That's why he's had some available capital.

All that will be eliminated. Banks would not be concerned about a bond in this case. Are you going to get your money? Are you going to be competing? Are you going to have more sales, more accounts receivables? They are not concerned about a bond. That doesn't help him.

THE COURT: Do you have any more questions to ask of Mr. McKee?

MR. MAC CRATE: Yes, your Honor. I did want to ask him some further questions.

CROSS EXAMINATION CONTINUED

XX BY MR. MAC CRATE:

Q I do want to inquire with respect to your receivables, Mr. McKee.

Do you collect your receivables on a periodic basis; do you bill your customers at the end of an accounting period or do you bill them over the period of a month's time, as you make deliveries?

A Well, the billing is done on a daily basis and the statements are sent out on a monthly basis.

Q Statements are sent out on a monthly basis, and on what terms do you sell to the body shops?

A Thirty day credit.

Q So that you would ordinarily receive payments upon your January sales early in March?

A Well, this is taking into consideration that we don't have any delinquent payments, but we do have some overdue accounts.

Q But customarily, for parts that you deliver in January, if there is no delinquency, you receive payment in March?

A In January we receive payment during the month of February and March.

Q And March. And then with respect to your payments to Pleasantville, those payments are made by any particular date in the month, are they?

A Those payments are made now as I receive money from my accounts. Once I have enough money I will mail a

check automatically to Pleasantville to try and reduce my indebtedness.

Q Haven't you for many years sent periodic payments to the Ford dealers from whom you purchased parts?

A Yes, I have tried to do it on a weekly basis.

Q So that your weekly payments are in keeping with your past practice in that respect?

A Yes.

Q During the month of February you did make payments to Pleasantville Ford?

A I made some payments. I don't remember how many.

Q During the month of March, 1976, you also made payments to Pleasantville Ford?

A Yes, I have.

Q With respect to Empire, when did you discuss with them buying parts from them?

A The latter part of February, 1976.

Q Can you tell us if anybody else was present when you had this conversation?

MR. SCHLESINGER: Your Honor, I thought we weren't going to go into --

THE COURT: Objection overruled.

A If anybody else was present with the dealer principal?

Q Yes.

A Yes, the parts manager of the company.

Q What was his name?

A I don't know his second name. I've only known him by Bobby for years.

Q And you had a conversation towards the end of February, that's last month, with the principal of Empire and his parts manager?

A That's correct.

Q Will you tell us the substance of that conversation?

A The substance of it was that after we had completed litigation, then I would come back and discuss the situation with them. But at that point they were willing to sell me parts on the same basis as what I'm now buying them.

Q But you would come back after the litigation was completed to have further discussions?

A To have further discussions, particularly of the wholesale incentive.

Q So that the wholesale incentive was not specifically discussed in that conversation?

A It was discussed at that conversation.

Q You mean it was referred to?

A Referred to is correct.

Q What would be done was left for further discussions with them?

A It was discussed to the point that Empire Ford would be willing, provided it was available to them, to pay.

Q Have you had any subsequent conversations with them since that time, on the subject of your general arrangements?

A I have had some conversations, but not on the substance of it.

Q Have you told them that Ford is proposing to appeal the decision in this case?

A No, I have not.

Q Have you had any conversations with Pleasantville regarding the decision that was rendered on December 19th?

A No, I have not.

Q And you therefore had no occasion to advise Pleasantville about Ford's intention to appeal?

A No, I didn't.

MR. MAC CRATE: I have no further questions.

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THE COURT: Anything else?

MR. SCHLESINGER: No, your Honor.

THE COURT: Let me put a statement on the record of my conclusion.

On March 17, 1976 I signed a judgment and injunction in favor of plaintiff and against defendant Ford Motor Company, granting damages of approximately $875,000 and attorneys' fees of about $135,000.

I also directed that Ford make available to dealers selling to FLM the same wholesale incentive allowances granted by Ford to its dealers selling to other parties.

The injunction required that a letter be sent out to Ford dealers in New York City announcing this result. On March 23rd, today, I signed an amended judgment which corrected an error in form. However, the substance of the judgment and the injunction remained the same.

Ford has filed a supersedeas bond which stays the execution of the money judgment, pending appeal. Ford has filed a notice of appeal. Ford requests this Court now to stay the injunction under Rule 62(c) of the Rules of Civil Procedure.

In the exercise of my discretion under Rule 62(c),

I am denying the application for a stay, although I will make some modification in the injunction, which I will describe shortly.

There is no question that there are issues raised by my decision and by the judgment and injunction which merit review by the Court of Appeals; in other words, there can be no contention that Ford is appealing simply for purposes of delay or harassment.

However, I must say, and in this I am, of course, not free from prejudice, but I must say that I am personally sufficiently convinced of the correctness of my decision under the Robinson-Patman Act that I would think that the chances of Ford winning on appeal are considerably less than even.

But the most weighty factor in my refusing to stay the injunction is my assessment of the relative equities and advantages and disadvantages to FLM and to Ford in the situation.

FLM has waited a long time for injunctive relief. FLM, when the action was originally brought, filed a motion for preliminary injunction. That motion was withdrawn in the spring of 1974 when it appeared that there could be a reasonably prompt trial.

The trial was held in September and early

October, 1974, which was with the promptness contemplated by FLM when it withdrew its preliminary injunction motion.

However, due to a variety of circumstances, the decision of the Court was unusually long in coming.

The decision on liability did not come down until December 19, 1975.

Even then it was clear that the record had not been closed on damages so there were further damage hearings in February and March of 1976.

So the net result was that FLM achieved no relief until mid-March of 1976.

FLM has, for a long time, contended that the deprivation of the wholesale incentive allowance has threatened the continued solvency of its business and its ability to stay in business.

FLM is now particularly urgent in its protestations about the need for injunctive relief to permit it to remain in business. Ford contends that these protestations are of doubtful credibility because they have been made before and FLM has still stayed in business.

I cannot take quite the same jaundice view of FLM's assertions. The financial facts are in the record and they show quite convincingly that FLM's profitability drastically declined the moment the wholesale incentive

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allowance was withdrawn.

I have recited, and I do not intend to repeat, the various effects which the record shows occurred as a result of this situation.

It is clear that despite the competitive disadvantages and despite the financial hardship which has been experienced by FLM this company has still managed to remain in business.

I am convinced that this has occurred because of its hope and trust that it would obtain relief in this action.

Apparently it has used old trucks, it has reduced its officers' salaries drastically, it has done away with or reduced contributions to pension plans; it has obviously lived on a shoestring pending the outcome of this action.

Ford contends that this should be allowed to go on pending the appeal. FLM contends that it is time to have relief and that relief should not be delayed.

I favor the contention of FLM in this regard. I think the time has come when FLM has amply demonstrated the merits of its case and that it should have relief.

I am convinced that relief should no longer be delayed. If the injunction goes into effect now, what

it means is that the dealers with whom FLM is doing business will be granted the wholesale incentive allowance by Ford.

The evidence before me indicates that although it is up to FLM to negotiate with these dealers as to whether or not this incentive is passed on to FLM, nevertheless, FLM was able to obtain this benefit until the moment when Ford acted to withdraw it from the dealers, and the only reasonable inference available to me is that FLM can obtain the benefit once again if Ford grants the benefit to its dealers.

If the injunction goes into effect, and if the situation goes forward as one can reasonably expect, this means that FLM will receive the benefits of the wholesale incentive allowance for all purchases of parts by it, commencing at the present time. That is, late March, and continuing on hereafter.

Apparently its purchases from Ford dealers are running on an average month about $60,000. The net result of getting the benefit of the wholesale incentive allowance would be that its costs for parts from now on would be reduced at the rate of about $8,000 per month.

This is a very substantial benefit to FLM and I have no doubt that it would permit the development of

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working capital for purchase of equipment, employment of personnel, increases in salaries and so forth, which are badly needed.

I also am convinced that this is not a mirage when FLM contends that if it is not granted relief it may well become insolvent and go out of business.

The disadvantages to Ford in denying this stay are minimal. Ford asserts that it will prosecute the appeal promptly, although Ford gives no definite time when it intends to file its brief. And of course, Ford cannot predict when the Court of Appeals will hear the case or when the Court of Appeals will utlimately decide it. Even after this Court of Appeals decides there could very well be further proceedings in the Supreme Court.

So we have an Appeallate process which is sure to involve the consumption of at least many months, if not considerably longer.

But, in any event, all that Ford is being asked to do by this injunction is to grant Ford dealers selling to FLM the same wholesale incentive that Ford grants to dealers when they sell directly to independent body shops.

The injunction does not create some new or novel business system or financial responsibility on the

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part of Ford. Ford grants large amounts of wholesale incentive allowances each month. The amount added by the injunction here to its total wholesale incentive allowance liability is really minimal, from Ford's standpoint, although very great from FLM's standpoint.

Ford has raised the spector of what I can only say is a subversion of the order, and that is as follows:

Ford states that even if the stay is denied it will be incumbent upon it for some reason to write the dealers and tell them that the matter is on appeal and that if the District Court's judgment is reversed, Ford will be seeking restitution from the dealers of all wholesale incentive allowances paid during pendency of the appeal.

I suppose that one could easily predict that a Ford dealer faced with this piece of information may be quite reluctant to deal with FLM in the normal manner that otherwise might be carried out.

It is really not up to me to make a final judgment at this time about Ford's right to restitution. On the other hand, the matter needs to be dealt with because it affects the ability of the Court to have its order given practical effect.

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Accordingly, I must offer at this juncture the opinion that I see no valid reason for Ford communicating to its dealers in the way it proposes.

If Ford does not succeed in obtaining a stay either from the District Court or from the Court of Appeals, the result is that Ford, during the time when the order is in effect, when the injunction of the Court is in effect, Ford is obligated to pay the wholesale incentive allowances to its dealers. These are final transactions. There is no condition in the injunction making these payments defeasible in some way. There is no cloud on the title of the dealers to the money that I can see.

The money belongs to the dealers. Now, if the dealers pass the money on to FLM, it seems to me it belongs to FLM until some Court vacates the injunction.

In the standpoint of equity and fairness, it is very difficult to see why it is so drastically important to Ford to recover back monies which it has paid pursuant to a lawful court order during the time that order is in effect.

I was reminded yesterday, and I think it is of some consequence, that following the change of Ford's wholesale incentive policy back in 1971, it allowed the

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payments to be made to dealers selling to FLM for a period of more than a year and didn't bring a restitution action to get all of that money back.

All in all, the possible damage to FLM, depriving it of its rights as determined by the Court, is, in my view, extremely severe and great, and I believe that the time has come to have injunctive relief go into effect.

The corresponding disadvantage and advantage to Ford is minimal. I am only inclined to make one modification of the injunction.

I will suspend that part of the injunction which requires Ford to send out the letter to all the dealers in the New York area. We have been given the names of two Ford dealers with whom FLM proposes to deal, Pleasantville and Empire, and the letter which Ford sends out will be limited to those two dealers, at least for the present, and in the absence of any further application.

With that modification, and with that exception, the request for a stay is hereby denied.

MR. SCHLESINGER: Your Honor, just one question on the point of notification to dealers. In the event it arises that FLM is in the process of acquiring

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relations with some other dealers, may we informally advise the Court, instead of doing it each time --

THE COURT: Judging by past history, I have a feeling that this isn't going to involve many different people. FLM has never just moved all over New York buying its parts. It's dealt with one or two people at a time. That is the pattern now. If you need some further relief, you can come to the Court and ask for it, but I do not think you will because I think that the intent of the Court is plain and if FLM goes to another dealer, I think it can convey the message. If some further action by the Court is necessary, why, it can be sought.

I don't see any reason, pending the appeal, to have Ford sending a letter to all over New York City, because the -- and I think the relief now should be limited tothose dealers with whom FLM is specifically dealing.

MR. SCHLESINGER: Thank you.

MR. MAC CRATE: I assume your Honor has considered the possible discriminatory effect with respect to other dealers and has dismissed that as not of the Court's concern.

THE COURT: I have not considered it because you have not raised it.

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MR. MAC CRATE: I didn't know that your Honor was contemplating this particular modification.

THE COURT: If you don't want that modification, you don't have to have it. But the -- you are talking about the letter, right?

MR. MAC CRATE: Yes, your Honor.

THE COURT: All right. The letter refers to sales to FLM Collision Parts. I don't know what the discrimination is, because if you are Sutton Ford, whatever the place is, down on First Avenue and 50th Street -- I don't know the names of these people -- but if you are a Ford dealer down in midtown Manhattan, you get this letter, and I think it would be of interest to put in the file because you don't deal with FLM. FLM has never come to you.

MR. MAC CRATE: There are other dealers in Westchester, your Honor, with whom FLM has dealt and --

THE COURT: Mr. MacCrate, if you don't want the modification you don't have to have it. I thought it was a way to limit the relief here pending appeal to just the most limited situation possible.

It is really for Ford's benefit. If Ford doesn't want the modification I will cancel that modification instantly.

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MR. MAC CRATE: May I consult for a moment?

THE COURT: Sure.

(Pause)

THE COURT: Can you give me an answer?

MR. MAC CRATE: Yes, your Honor. We will accept the modification.

THE COURT: I think that makes sense. Thank you very much.

(Pause)

THE COURT: I think it is a very serious problem, the threat of Ford to send this letter. Now, I am so convinced that it would subvert the injunction that I do not think it ought to be sent. Either you ought to get a stay -- I mean -- or you ought not to.

If you can convince me or if you can convince the Court of Appeals to grant you a stay, that is all fair and square. No problem. Then the situation is clearcut. But I am very troubled by the idea that you -- that the Court denies a stay but then Ford sends out letters saying, "Well, we will pay you this under protest and we will sue you to get it all back if we win on appeal."

I don't think there is a --I think that is simply a subversion of the injunction. I don't think there is any free speech right or anything else. I am

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going to direct that you cannot send out such a letter. I am doing so simply in aid of the jurisdiction of the Court to make its injunction effective.

MR. MAC CRATE: Your Honor, does your direction foreclose just a simple statement to the effect that in the event decision is reversed on appeal, Ford claims that it would be entitled to the restitution of any such amounts?

THE COURT: I am going to forbid that because -- this develops at this hearing without full briefing from anybody. Nobody briefed the right to restitution. You didn't, and obviously the other side didn't.

On an application for a stay, I don't purport to undertake to explore all the legal rights, but I think it is necessarily implicit in the injunction that if you grant it -- if you are ordered by the Court to grant the wholesale incentive allowance, the recipient of that allowance, while that order is in effect, is entitled to that money, otherwise the injunction is senseless. The injunction should be stayed under those circumstances.

In my judgment that judgment should not be stayed, and it is my intention that the money be paid and it belongs to the recipient as long as this Court order is in effect, and until it is vacated.

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Now, to say that you will then at a later point seek to get it all back, that is plenty contrary to the intent of the injunction and my intent of denying the stay.

I fully realize that the case is on appeal. I fully realize that Ford may win on appeal, because the Court of Appeals frequently disagrees with the District Court. I fully realize that maybe the Supreme Court might get it and disagree with me. With all that realization, I am saying that Ford should go ahead and pay these amounts, penidng these appeals.

In doing so, I mean that to be paid finally. I don't mean to have it conditionally. If it was conditional I would have it put in an escrow account, or your bond will be sufficient. Ford is good for the money and will be good for it.

I regret to say I just cannot agree with any proposition that this kind of notice should be given. I am going to take that position and I want it clear, because I want you to know perfectly clear the full implications of what I am doing when you go up to the Court of Appeals, and I am directing that no notice of any kind, no indication from Ford of any kind is to be given to these dealers that Ford will some day seek to

recover this money back because of reversal on appeal.

I am doing so, and I repeat, simply because that such a notice, in my view, would completely subvert the injunction.

All right.

(Time noted: 1:10 p.m.)

oOo

Amended Judgment of Judge Griesa, March 24, 1976

ENTERED
U.S.D.C.
FILED
MAR 23, 1976
S.D. of N.Y.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

- x

73 Civ. 713 (TPG)

AMENDED JUDGEMENT

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SULLIVAN & CROMWELL
48 WALL ST
NEW YORK, N.Y.

This action having come on for trial before this Court, the Honorable Thomas P. Griesa, United States District Judge, presiding, on September 23, 24, 25, 30 and October 7, 8 and 9, 1974 and the issues having been duly tried, and a decision on liability having been duly rendered in an opinion dated December 19, 1975, and the said opinion constituting the Court's findings of fact and conclusions of law on the liability phase of the case and this Court having conducted further hearings on February 9 and March 2, 1976, at which evidence was received on plaintiff's claim for damages, and a supplemental decision on damages and attorneys' fees having been duly rendered in an opinion dated March 17, 1976 and the said opinion constituting the Court's findings of fact and conclusions of law on the damages phase of the case, and this Court having jurisdiction of this action based upon Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26; and defendant Ford Marketing Corporation having been merged into defendant Ford Motor Company as of the close of business on December 31, 1974, it is hereby:

Order and Judgment

1. ORDERED, ADJUDGED AND DECREED that the plaintiff has failed to make out any claim for relief under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2 and plaintiff's claims thereunder are hereby dismissed;

2. ORDERED, ADJUDGED AND DECREED that the plaintiff has proved its cause of action against defendant Ford Marketing Corporation (now merged into Ford Motor Company) for violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. §13(c), and the plaintiff having proved damages in the amount of $291,502.00, the plaintiff is entitled to recover treble that amount against defendant Ford Motor Company pursuant to 15 U.S.C. §15 and in accordance with said provision the plaintiff is hereby awarded judgment therefor against the defendant Ford Motor Company in the amount of $874,506.00, together with attorneys' fees to be paid by defendant Ford Motor Company in the amount of $135,000.00 and costs to be taxed by the Clerk of the Court against said defendant.

Injunction

The defendant Ford Marketing Corporation having been found to have discriminated in prices between franchised dealers in the sale of crash parts in violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. §13(c), and the plaintiff being entitled to injunctive relief therefor pursuant to 15 U.S.C. §26 to prevent any such further violation of said Section in the future, it is hereby

ORDERED AND DECREED that defendant Ford Motor Company commencing on April 1, 1976 shall grant the wholesale incentive allowance to franchised dealers on the resale of crash parts by such dealers to FLM Collision Parts, Inc., on the same terms and conditions as such wholesale incentive allowance is granted to such dealers on the resale of crash parts to any other "eligible customers" as that term is defined and used in Ford's Master Price List and Ford's Policy and Procedure Manual; and it is

FURTHER ORDERED AND DECREED that defendant Ford Motor Company no later than April 1, 1976 distribute by first class mail to each of its franchised Ford and Lincoln-Mercury dealers located in the New York metropolitan area served by defendant's Master Parts Depot located in Teterboro, New Jersey, in the form annexed hereto as Exhibit A, a statement informing such dealers that defendant Ford Motor Company will grant the wholesale incentive allowance to such dealers on the resale of crash parts by such dealers to FLM Collision Parts, Inc. on the same terms and conditions as such wholesale incentive allowance is granted to such dealers on the resale of crash parts to any other "eligible customers" as that term is defined and used in Ford's Master Price List and Ford's Policy and Procedure Manual.

Retention of Jurisdiction

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to apply to this

Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this order, judgment and injunction, for the modification of any of the provisions thereof, for the enforcement of compliance therewith, and for punishment of any violations thereof.

Dated: New York, New York
~~March 17, 1976~~
MARCH 23, 1976

S/Thomas P. Griesa
THOMAS P. GRIESA
United States District Judge

JUDGEMENT ENTERED 3/24/76
S/Raymond F. Burghardt
CLERK

EXHIBIT A 2154a Date

(Name of Dealer to Be Supplied)

Gentlemen:

In a proceeding brought by FLM Collision Parts, Inc. against Ford Motor Company in the United States District Court for the Southern District of New York (73 Civ. 713), United States District Judge Thomas P. Griesa on December 19, 1975 found that Ford's failure to grant the wholesale incentive on resales by its franchised dealers of crash parts to FLM Collision Parts, Inc. was price discrimination in violation of Section 2(a) of the Robinson-Patman Act.

Accordingly, please be advised that as of March 17, 1976, the Court issued an injunction directing Ford to grant the wholesale incentive allowance to franchised dealers on the resale of crash parts by such dealers to FLM Collision Parts, Inc. on the same terms and conditions as such wholesale incentive allowance is granted to such dealers on the resale of crash parts to any other "eligible customers" as that term is defined and used in Ford's Master Price List and Ford's Policy and Procedure Manual.

This is to advise you that any crash parts resold by you to FLM Collision Parts, Inc. on and after April 1, 1976 are eligible for the wholesale incentive allowance and Ford will pay such an allowance to you in accordance with the terms of the Policy and Procedure Manual.

Very truly yours,

FORD MOTOR COMPANY

73 CIVIL ACTION NO. 713 (TPG)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
NEW YORK

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

SULLIVAN & CROMWELL
48 WALL ST. NEW YORK, N.Y.

ORDER, JUDGMENT
AND INJUNCTION

SULLIVAN & CROMWELL
48 WALL STREET, NEW YORK, N. Y. 10005
(212) 952-8100

ATTORNEYS FOR
Defendants
Ford Motor Company and
Ford Marketing Corporation

21554

Defendants' Notice of Appeal from Amended Judgment, March 26, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

73 Civ. 713 (TPG)

NOTICE OF APPEAL

- x

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SULLIVAN & CROMWELL
48 WALL ST. NEW YORK, N. Y.

Notice is hereby given that Ford Motor Company and Ford Marketing Corporation, defendants above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the amended judgment entered in this action on the 23rd day of March, 1976.

Dated: New York, New York
March 26, 1976

SULLIVAN & CROMWELL

By Robert MacCrate
Robert MacCrate

Attorneys for Defendants
48 Wall Street
New York, New York 10005
(212) 952-8100

TO:

Clerk of the United States
District Court
For the Southern District of
New York

Julien & Schlesinger, P.C.
2 Lafayette Street
New York, New York 10007

3-26-76

Letter of Robert MacCrate, Esq., to Stuart A. Schlesinger, Esq., March 26, 1976

SULLIVAN & CROMWELL

2157a

NEW YORK TELEPHONE: (212) 952-8100
TELEX: 62604 (INTERNATIONAL), 127816 (DOMESTIC)
CABLE ADDRESS: LADYCOURT, NEW YORK

48 WALL STREET, NEW YORK 10005

280 PARK AVENUE, NEW YORK 10017
17, AVENUE MATIGNON, 75008 PARIS
21 IRONMONGER LANE, LONDON EC2V 8JS

March 26, 1976

Stuart A. Schlesinger, Esq.,
Julien & Schlesinger, P. C.,
Two Lafayette Street,
New York, New York 10007.

Re: FLM Collision Parts, Inc.,
v. Ford Motor Company.

Dear Stuart:

This letter confirms my telephone call to you of Wednesday afternoon, March 24. At that time, as I informed you, I had just been advised that the operator of Empire Ford Sales, Inc. in Mount Vernon, New York, had been terminated on March 23, and that Ford Motor Company was, temporarily at least, the sole shareholder of Empire.

As you know, Empire was identified for the first time by Mr. McKee at the hearing before Judge Griesa on March 23 as a dealer from whom FLM Collision Parts, Inc. contemplated purchasing Ford crash parts and was, therefore, designated as one of the two franchised dealers to which Ford would give notice, during the pendency of the appeal in accordance with the judgment. In view of this fact, I communicated to you immediately the preliminary information which I had received from Mr. Zolbert, who likewise had been informed only on Wednesday afternoon of what had occurred.

I have now received more details concerning the termination of the operator at Empire and the background of the action taken by Ford which I undertook to furnish you.

I am informed that Empire is a "Dealer Development" dealership which has been in serious financial difficulties. Under the terms of the Management Agreement entered into between Empire, as a "Dealer Development" dealership, and its operator, the operator could be terminated if the dealership incurred losses such that the dealership's issued and outstanding common stock had no value. In such event, Ford is required by the terms of its Dealer Development Contract with Empire to purchase the entire common stock of the dealership for one dollar.

Empire's financial condition deteriorated markedly during December 1975 and January 1976, showing substantial losses. By early February, the losses had become so severe that Empire's common stock was virtually worthless. At that time the Dealer Development office in Teterboro recommended to Ford headquarters that Empire's operator be terminated in accordance with the terms of the Management Agreement. This recommendation was given final approval at Ford headquarters on March 17 and the operator was notified by telegram sent March 18 that a board of directors meeting of Empire would be held on March 23.

At the March 23 meeting, the operator was asked to resign; when he refused, the board of directors voted to terminate the Management Agreement on the grounds that the common stock of Empire had become worthless. Accordingly, Ford was required pursuant to the Dealer Development Contract to purchase for one dollar all the common stock, thereby making Ford the present sole shareholder of Empire.

In view of this turn of events of which we were totally unaware at the time of the hearing on March 23, and in keeping with Ford's intention to comply fully with the order and injunction entered in this action, I have been authorized to inform you that Ford is prepared to send to a franchised dealer selected by FLM in substitution for Empire a letter in the form attached to the judgment entered by Judge Griesa in this action.

If FLM desires to select a second franchised dealer and to avail itself of Ford's offer to send to such dealer the stipulated letter, I request that you so advise me when such a selection is made.

Very truly yours,

Robert MacCrate

cc: Hon. Thomas P. Griesa
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007.

Defendants' Supersedeas Bond, April 5, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

FLM COLLISION PARTS, INC., :

Plaintiff, :

-against- : 73 Civ. 713

FORD MOTOR COMPANY and FORD MARKETING CORPORATION, :

Defendants. :

- x

S I R S :

PLEASE TAKE NOTICE that the within is a true copy of a supersedeas bond filed in the office of the Clerk of the within named court on the 5th day of April, 1976.

Dated: New York, N.Y.
April 5, 1976

Yours, etc.,

SULLIVAN & CROMWELL
Attorneys for Defendants
48 Wall Street
New York, N.Y. 10005

TO:
JULIEN & SCHLESINGER, P.C.
Attorneys for Plaintiff
2 Lafayette Street
New York, N.Y. 10007

4-5-76

AMERICAN HOME
ASSURANCE COMPANY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FLM COLLISION PARTS, INC., Plaintif, -against- FORD MOTOR COMPANY and FORD MARKETING CORPORATION, Defendants.	:	73 Civ. 713 (TPG)

SUPERSEDEAS BOND

NOW ALL MEN BY THESE PRESENTS, That we, FORD MOTOR COMPANY as Principal, and AMERICAN HOME ASSURANCE COMPANY as Surety, are held and firmly bound unto FLM COLLISION PARTS, INC., in the principal sum of ONE MILLION ONE HUNDRED TWENTY THOUSAND EIGHT HUNDRED ONE DOLLARS AND SIXTY-SIX CENTS ($1,120,801.66) lawful money of the United States of America, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents. The condition of this obligation is that whereas the above-named FORD MOTOR COMPANY, Principal, has entered its appeal to the United States Court of Appeals for the Second Circuit on March 26, 1976, to review the judgment entered in the above-styled cause by the United States District Court for the Southern District of New York on the 24th day of March, 1976.

NOW, THEREFORE, FORD MOTOR COMPANY, Principal, shall pay to FLM COLLISION PARTS, INC. all costs, interests and damages that may be adjudged against it on the appeal; that

if it should be affirmed. If the appeal is dismissed, set aside or reversed, then this obligation shall be null and void.

2162a

SIGNED AND SEALED this 2nd day of April, A. D. 1976, at Dearborn, Wayne County, Michigan.

FORD MOTOR COMPANY

By _____ (SEAL)

As Its Assistant Secretary

PRINCIPAL

AMERICAN HOME ASSURANCE COMPANY

By _____ (SEAL)

William D. Kramer
As Its Attorney In Fact

SURETY

POWER OF ATTORNEY

2163a

KNOW ALL MEN BY THESE PRESENTS:

THAT AMERICAN HOME ASSURANCE COMPANY, a Corporation duly organized and existing under the laws of the State of New York, and having its principal office in the City of New York, N.Y., has made, constituted and appointed, and does by these presents make, constitute and appoint

William D. Kramer

of **Dearborn, Michigan**

its true and lawful Attorney(s) in Fact, with full power and authority hereby conferred in its name, place and stead to acknowledge and deliver

any and all bonds, undertakings, recognizances or other written obligations in the nature thereof, including Consents of Surety.

and to bind the Company thereby as fully and to the same extent as if such bonds were signed by the President, sealed with the corporate seal of the Company and duly attested by its Secretary, hereby ratifying and confirming all that the said Attorney(s) in Fact may do in the premises. Said appointment is made under and by authority of the provisions of the following resolution duly adopted at the regular meeting of the Executive Committee of the Board of Directors of the American Home Assurance Company, duly called and held at 102 Maiden Lane in the Borough of Manhattan, City of New York, on the 11th day of July, 1957, a quorum being present:

RESOLVED: That all bonds and undertakings, recognizances, contracts of indemnity and all other writings obligatory in the nature thereof, shall be signed by the Chairman of the Board or the President, or any Vice President or Resident Vice President and duly attested by the Secretary, any Assistant Secretary or Resident Assistant Secretary and the corporate seal of the Company affixed thereto; or, such instruments aforesaid may be signed by an Attorney in Fact, duly appointed and qualified, either individually or in conjunction with some other person or Attorney in Fact, as designated in his appointment, and the corporate seal of the Company affixed thereto.

AND THAT at a regular meeting of the Board of Directors of the AMERICAN HOME ASSURANCE COMPANY duly called and held at 102 Maiden Lane, in the Borough of Manhattan, City of New York, on the 22nd day of May, 1973, at which a quorum was present, the following resolutions, which are still in effect, were duly adopted:

"RESOLVED, that any Secretary or any Assistant Secretary of this Corporation is authorized to certify with respect to the appointment and continuing authority of any Attorney-in-fact to execute on behalf of this Corporation, bonds and undertakings, recognizances, contracts of indemnity and other writings obligatory in nature, pursuant to resolution of the Executive Committee of the Board of Directors of this Corporation adopted at a regular meeting held on the 11th day of July, 1957, and that the signature of any such certifying officer may be a facsimile thereof or may be engraved or printed; and it was further

"RESOLVED, that any such Attorney-in-fact delivering a secretarial certification referred to in the immediately preceding resolution may insert in such certification the date thereof, said date to be not later than the date of delivery thereof by such Attorney-in-fact."

IN WITNESS WHEREOF, AMERICAN HOME ASSURANCE COMPANY has caused these presents to be signed by a Vice President, attested by a Secretary, and its corporate seal to be hereto affixed this 23 day of October A.D. 19 73

AMERICAN HOME ASSURANCE COMPANY

(Seal)

By _____
Vice President

ATTEST John Gavora
Secretary

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

On the 23 day of October A.D. 19 73 before me personally came Leonard H. Collier to me known, who, being by me duly sworn, did depose and say that he is a Vice President of AMERICAN HOME ASSURANCE COMPANY, the Company described in and which executed the preceding instrument; that he knows the seal of said Company; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Company and that he signed his name thereto by like order. And said Leonard H. Collier further said that he is acquainted with John Gavora and knows him to be a Secretary of said Company; and that he executed the above instrument.

Joseph H. Policella
Notary Public

JOSEPH H. POLICELLA
NOTARY PUBLIC, STATE OF NEW YORK
No. 03-[illegible]9305
Qualified in Bronx County
Certificate filed in New York County
Commission expires March 30, 1974

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

I, John Gavora, as a Secretary of AMERICAN HOME ASSURANCE COMPANY, do hereby certify that the foregoing is a true and correct copy of a Power of Attorney (including applicable resolution), executed by said AMERICAN HOME ASSURANCE COMPANY, which is still in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Company in the City of New York, State of New York, this 2nd day of April A.D. 1976.

John Gavora
Secretary

Form 26338 (9-73)

...Insurance Company

ORGANIZED 1899 NEW YORK, N.Y. 2164a

STATEMENT as of DECEMBER 31, 1974

Admitted Assets	December 31, 1974	Liabilities, Capital and Surplus	
Bonds	$ 74,583,761	Reserve for Losses and Loss Expenses	$ 78,510,720
Stocks	53,601,504	Reserve for Unearned Premiums	51,613,244
Cash and Bank Deposits	3,600,238	Reserve for Expenses, Taxes, Licenses and Fees	3,389,178
Agents Balances or Uncollected Premiums	19,063,513	Reserve for Unauthorized Reinsurance	2,515,505
Funds Held by Ceding Reinsurers	522,632	Funds Held under Reinsurance Treaties	24,021,693
Reinsurance Recoverable on Loss Payments	1,172,005	Other Liabilities	7,826,103
Company's Interest in Assets of American International Underwriters Association	28,002,428	Total Liabilities	167,876,443
Other Admitted Assets	15,322,300	Capital Stock	4,237,635
		Surplus	23,754,303
Total Assets	$195,868,381	Total Policyholders' Surplus	27,991,938
		Total Liabilities and Policyholders' Surplus	$195,868,381

Bonds and Stocks are valued in accordance with the basis adopted by the National Association of Insurance Commissioners.

Securities carried at $ 28,393,494 in the above statement are deposited as required by law.

State of New York
County of New York } *SS:*

MARION E. FAJEN, Secretary and THOMAS J. SEIPPEL, Comptroller of the American Home Assurance Company being duly sworn, each for himself deposes and says that they are the above described officers of the said Company and that on the 31st day of December, 1974, the Company was actually possessed of the assets set forth in foregoing statement and that such assets were available for the payment of losses and claims and held for the protection of its policyholders and creditors, except as hereinbefore indicated, and that the foregoing statement is a correct exhibit of such assets and liabilities of the said company on the 31st day of December, 1974 according to the best of their information, knowledge and belief, respectively.

Marion E. Fajen
Secretary

Corporation's Seal

Thomas J. Seippel
Comptroller

Sworn to and subscribed before me this 24th day of April, 1975

LEO SCHULTZ

NOTARY PUBLIC OF NEW YORK
No. 41-4524065 Qual. Queens Co.
Cert. Filed in New York County
My Commission Expires March 30, 1976

Notarial Seal

Form 20801 (5/75)

73 CIVIL ACTION NO. 713

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
NEW YORK

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

BOND WITH NOTICE
OF FILING

SULLIVAN & CROMWELL
48 WALL STREET, NEW YORK, N. Y. 10005
952-8100
ATTORNEYS FOR
Defendants

2165A

Memorandum Endorsement of Judge Griesa Denying Stay of Injunction Pending Appeal as Modified, April 5, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
NEW YORK

FILM COLLISION PARTS, INC.,

Plaintiffs,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

ORDER TO SHOW CAUSE
AND AFFIDAVIT

SULLIVAN & CROMWELL
48 WALL STREET, NEW YORK, N.Y. 10005
(212) 952 8100

ATTORNEYS FOR
Defendants
Ford Motor Company and Ford
Marketing Corporation

RECEIVED
MAR 23 1976
1030

2166A

Plaintiff's Notice of Cross-Appeal, April 13, 1976

2167a

FILED
APRIL 13, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

----------x

73 Civ. 713 (TPG)

NOTICE OF CROSS-APPEAL

Notice is hereby given that the plaintiff FLM Collision Parts, Inc., hereby cross appeals to the United States Court of Appeals for the Second Circuit from the amended judgment entered in this action on the 23rd day of March, 1976 in so far as the District Court found that:

a. The defendants did not violate Sections 1 and 2 of the Sherman Act.

b. The plaintiff was not an indirect purchaser from the defendants.

c. The failure of the District Court to award the plaintiff such damages as it was rightfully entitled to.

d. The failure to award attorney's fees and costs as requested by the plaintiff.

Dated: New York, New York
April 13, 1976.

JULIEN & SCHLESINGER, P.C.

By Gerard A. Schlesinger

Attorneys for the Plaintiff
2 Lafayette Street
New York, New York 10007
(212) 962-8020

TO:

Clerk of the United States
District Court
For the Southern District
of New York

Sullivan & Cromwell, Esqs.
48 Wall Street
New York, New York 10005

STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

2168a

Check Applicable Box

☐ Certification By Attorney — certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation — shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

Check Applicable Box

☐ Individual Verification — being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification — the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at

Check Applicable Box

☐ Affidavit of Service By Mail — On 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York

☐ Affidavit of Personal Service — On 19 at deponent served the within upon the herein, by delivering a true copy thereof personally. Deponent knew the person so served to be the person mentioned and described in said papers as therein

Sworn to before me on 19

.....

The name signed must be printed beneath

NOTICE OF ENTRY

lease take notice that the within is a *(certified)*
opy of a
entered in the office of the clerk of the within
d court on 19

Yours, etc.,
JULIEN & SCHLESINGER P.C.
neys for
Office and Post Office Address
2 Lafayette Street
NEW YORK, N. Y. 10007

ney(s) for

NOTICE OF SETTLEMENT

Please take notice that an order

ich the within is a true copy will be presented
ttlement to the Hon.

f the judges of the within named Court, at

e day of 19
M.

Yours, etc.,
JULIEN & SCHLESINGER P.C.
neys for
Office and Post Office Address
2 Lafayette Street
NEW YORK, N. Y. 10007

ney(s) for

2169a

Index No. 73 Civ. 711 (TPC) Year 19
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILM COLLECTION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,

Defendants.

By mail from Clerk

NOTICE OF APPEAL

JULIEN & SCHLESINGER P.C.
Attorneys for Plaintiff
Office and Post Office Address, Telephone
2 Lafayette Street
NEW YORK, N. Y. 10007
(212) 962-8020

To SULLIVAN & CROMWELL, ESQS.

Attorney(s) for Defendants.

Service of a copy of the within
is hereby admitted.
Dated,

Attorney(s) for

1930 © 1972 JULIUS BLUMBERG INC. 80 EXCHANGE PLACE, N.Y. 10004

2169A